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CASES

ON

PERSONS AND DOMESTIC RELATIONS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

ALBERT M. KALES

WITH APPENDIX

ON

MARRIAGE AND DIVORCE

BY CHESTER G. VERNIER

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1913

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DEDICATED

TO

JAMES BARR AMES

whose success in reaching the vital problems of comparative common
law and in solving those problems consistently with precedent and sound legislative policy it is the author's desire to approximate

THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows: "It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is almost universally required for admission to the bar:

Administrative Law.
Agency.
Bailments.
Bills and Notes.
Carriers.
Code Pleading.
Common-Law Pleading.
Conflict of Laws.
Constitutional Law.
Contracts.
Corporations.
Criminal Law.
Criminal Procedure.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Legal Ethics.
Partnership.
Personal Property.
Public Corporations.
Quasi Contracts.
Real Property.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law in the University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law in the University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law in the University of Wisconsin, and Underhill Moore, Professor of Law in Columbia University.

Carriers. By Frederick Green, Professor of Law in the University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law in Yale University.

Constitutional Law. By James Parker Hall, Dean of the Faculty of Law in the University of Chicago.

Contracts. By Arthur L. Corbin, Professor of Law in Yale University.

Corporations. By Harry S. Richards, Dean of the Faculty of Law in the University of Wisconsin.

Criminal Law. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Criminal Procedure. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Damages. By Floyd R. Mechem, Professor of Law in the University of Chicago, and Barry Gilbert, of the Chicago Bar.

Equity. By George H. Boke, Professor of Law in the University of Oklahoma.

Evidence. By Edward W. Hinton, Professor of Law in the University of Chicago.

Insurance. By William R. Vance, Professor of Law in Yale University.

International Law. By James Brown Scott, Professor of International Law in Johns Hopkins University.

Legal Ethics, Cases and Other Authorities on. By George P. Costigan, Jr., Professor of Law in Northwestern University.

Partnership. By Eugene A. Gilmore, Professor of Law in the University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, of the Chicago Bar, and Chester G. Vernier, Professor of Law in Stanford University.

Pleading (*Common Law*). By Clarke B. Whittier, Professor of Law in Stanford University, and Edmund M. Morgan, Professor of Law in Yale University.

Property (Titles to Real Property). By Ralph W. Aigler, Professor of Law in the University of Michigan.

Property (*Personal*). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Rights in Land). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Wills, Descent, and Administration). By George P. Costigan, Jr., Professor of Law in Northwestern University.

Property (*Future Interests*). By Albert M. Kales, of the Chicago Bar.

Quasi Contracts. By Edward S. Thurston, Professor of Law in Yale University.

Sales. By Frederic C. Woodward, Professor of Law in the University of Chicago.

Suretyship. By Crawford D. Hening, formerly Professor of Law in the University of Pennsylvania.

Torts. By Charles M. Hepburn, Dean of the Faculty of Law in the University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law in the University of New York.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,
General Editor.

JUNE, 1921.

*

AUTHOR'S PREFATORY NOTE

Upon the re-examination of Professor Langdell's casebooks I am more than ever convinced that he was consciously attempting the exposition of the law of a single jurisdiction by means of selected cases from the courts of authority in that jurisdiction. He appears to me to have recognized clearly that law existed only with reference to the probable action of the courts of a particular jurisdiction. It logically followed that rules of law could be developed by means of cases, only with such decisions as the courts of that jurisdiction felt bound by or were apt to follow. The principal aim was to arrive, through a series of selected cases, at the final statement of the rules of law enforced in the particular jurisdiction. The problems developed were more apt to be those of logical deduction from fixed premises, than those of the conflicting legislative policies upon which different premises themselves were founded.

The jurisdiction which Langdell picked out to expose the law of was England. As the number of American students taught by casebooks grew and as they came from many different jurisdictions, it became apparent that there were limits to the time which could properly be devoted to a minute exposition of the rules administered in the English Courts. The point of view then changed. The aim naturally became that of presenting a study of legal problems from the point of view of the comparative results reached in many jurisdictions where the law was founded upon the Common Law of England. Thereupon it naturally became a more prominent feature of the casebook to present problems which arose from conflicting lines of decision in different jurisdictions and the consideration of the soundness from the point of view of legislative policy of the different premises upon which the different results were based.

Certainly one of the masters of the art of constructing casebooks upon this plan was Professor Ames. Several characteristics of his casebooks are clearly marked. The casebooks themselves are comparatively short. This brevity is gained in some degree by all the mechanical aids possible—such as editing the cases and selecting short ones rather than long ones. I believe, however, that it is mostly obtained by introducing the student at once to the problems of the subject, and placing all merely illustrative matters and simple deductions in the footnotes. Professor Ames did not neglect the giving of information pure and simple. His footnotes furnish an extensive commentary upon the subject with which he deals. He really furnishes the student with a valuable text-book to be used in connection with the problems which are studied.

Practical experience has shown that the characteristics which Professor Ames' casebooks so strikingly exhibit are to be achieved, so far as possible, whenever the casebooks already issued are revised. We find, for instance, in the second edition of Gray's Cases on Property that the volumes have been much shortened. Valuable matter which was formerly developed by cases, but was not of the problem-producing sort, is now placed in footnotes, while the new matter added, in practically all instances, tends to develop the difficult problems of the subject.

The subject-matter of Professor Ames' casebooks is essentially, as it seems to me, the comparative study, in a given subject, of the law of all jurisdictions where the law is founded upon the Common Law of England. Looked at from the way in which the subject-matter is handled, we find a distinct effort toward brevity in pages, toward securing problem-raising cases for the text and information for the notes.

It remains only to say that the canons of Professor Ames' art of constructing casebooks, as I observe them, I have endeavored to follow in compiling the present work. It is not desired to justify the present casebook on any other ground.

From using Judge Smith's casebook on Persons for a number of years in the classroom, and from making a careful summary of Professor Woodruff's cases on Domestic Relations, I have become very familiar with the arrangement and subject-matter of both collections of cases. I am greatly indebted to both authors for blazing the way into the subject by two quite different paths, and for many nice and subtle suggestions arising from the way their subjects and cases are arranged.

ALBERT M. KALES.

CHICAGO, December 1, 1910.

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CASES ON PERSONS AND DOMESTIC RELATIONS

PART I

PARENT AND CHILD

CHAPTER I

THE CUSTODY, CONTROL, AND DISCIPLINE OF THE CHILD

Ex parte SKINNER.

(Court of Common Pleas, 1824. 9 Moore, 278.)

Mr Serjeant Lawes, on a former day in this Term, applied for a writ of habeas corpus to be directed to William Skinner, the father of the applicant, and one Anne Deverall, to bring up the body of Skinner, the infant, who was six years of age, in order that it might be placed under the care of its mother. He founded his motion on affidavits of the mother, and others, who stated, that, after the marriage, Skinner had treated his wife with the greatest cruelty and brutality, and that a separation took place in consequence, and that he had since lived and cohabited with Deverall; that the wife had taken care of the child, but that the husband had some time since caused a writ of habeas corpus to be issued out of the Court of King's Bench, and that on the parties attending before Mr., now Lord Chief Justice Best, at Chambers, it was agreed, that the child should be placed under the care of a third person; that the father had since taken it away by stratagem and fraud, and that he was now confined in Horsemonger-lane Gaol, where he still cohabited with Deverall, and that she took the child to him every day.

The Court doubting their jurisdiction, and observing that the better course to be adopted was, to make an application to a Master in Chancery, who might cause a proper guardian to be appointed, and apply funds necessary for the maintenance and education of the child, granted a rule to shew cause why the writ of habeas corpus should not issue and be served on the father as well as the gaoler of Horsemonger-lane prison, requiring him to bring up the bodies of Skinner and his child. And on this day, no cause being shewn, the father and child attended in Court, the former being in the custody of the gaoler, when Mr. Serjeant Lawes renewed his application to have the child given up to its mother. [The argument of the learned Serjeant is omitted.]

Lord Chief Justice BEST. When this case first came before me at chambers, I felt considerable difficulty, and thought that, under the circumstances, neither the father nor mother was entitled to have the custody of the child; and it was there agreed on by both the parents, that it should be placed under the care and protection of a third person. Still the father had a power to take it away, and although the Court might direct the child to be brought up by a writ of habeas corpus, yet the difficulty is, what is to be done with it now it is before us. I was referred to Blisset's Case [Lofft, 748], and it certainly is extremely strong to shew, that the power of assigning the custody of a child brought before the Court of King's Bench, was discretionary, if the father appeared to be an improper person to take it; and I therefore thought that the most prudent course would be to assign it over to the care of a third person, and which was acceded to by both its parents. But it now appears that the father has removed the child, and has the custody of it himself; and no authority has been cited, to shew that this Court has jurisdiction to take it out of such custody for the purpose of delivering it over to the mother. In cases of similar applications to the Court of King's Bench, they generally refer the parties to a Master in Chancery, who may ascertain whether there be sufficient property to provide for the support of the child, or whether it might be made a ward of that Court, or he might appoint a guardian to take care of it; and that therefore appears to me to be the wisest and proper course; at all events, our authority can only be coequal with that of the Court of King's Bench. But the Court of Chancery has a jurisdiction as representing the King as Parens Patriæ, and that Court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receive proper instruction and education; and if a sum equivalent to its maintenance can be obtained, the Lord Chancellor will order it to be done, without enquiring where the funds are to come from.[1] In the case of The King v. De Manneville, the Court of King's Bench held (5 East, 221) that the father, although an alien enemy, of a child, however young, born in wedlock, was entitled to the custody of it, unless it appeared probable that he intended to remove it from the kingdom, or to abuse his trust; and on the child's being brought before them by a writ of habeas corpus, they ordered it to be remanded to the custody of the father; and on a petition being afterwards presented to the Lord Chancellor, on behalf of the mother and child, his Lordship made an order restraining the father from removing the child, or doing any act for the purpose of removing it out of the jurisdiction of that Court, and he would not allow the mother to have the possession of it, as she had withdrawn herself from the protection of her husband. On these grounds, I am of opinion that we have no authority to interfere in this case, and more particularly so, as there is no charge of ill-treatment by the father.

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[1] See, also, opinions of Lord Esher, M. R., and Kay, L. J., in Reg. v. Gyngall, L. R. [1893] 2 Q. B. 232, pp. 238–240, 246–249.

Mr. Justice Park. In the case of De Manneville v. De Manneville, the Lord Chancellor said, that (10 Ves. 59) the Court of King's Bench has not within it, by its constitution, any of that species of delegated authority that exists in the King as Parens Patriæ, and resides in the Court of Chancery, as representing his Majesty; and his Lordship further observed (Id. 61) that he had removed a child from its father, who was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant; and that he thought it not inconsistent with a due attention to parental authority, so abused, to call in the authority of the King as Parens Patriæ. That appears to me to be expressly applicable to the present case; and an application to that Court seems to be the proper course to be adopted. At all events, it shews that we have no power to interfere on a motion of this description.[2]

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[2] Accord: Rex v. Greenhill, 6 Nev. & Man. 244 (1836).

2 & 3 Vict. c. 54 (Talfourd's Act) enacted:

"I. Whereas it is expedient to amend the Law relating to the Custody of Infants, Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the Mother of any Infant or Infants being in the sole Custody or Control of the Father thereof, or of any Person by his Authority, or of any Guardian after the Death of the Father, if he shall see fit, to make Order for the Access of the Petitioner to such Infant or Infants, at such times and subject to such Regulations as he shall deem convenient and just; and if such Infant or Infants shall be within the Age of Seven Years, to make Order that such Infant or Infants shall be delivered to and remain in the Custody of the Petitioner until attaining such Age, subject to such Regulations as he shall deem convenient and just. * * *

"IV. Provided always, and be it enacted, That no Order shall be made by Virtue of this Act whereby any Mother against whom Adultery shall be established, by Judgment in an Action for Criminal Conversation at the Suit of her Husband, or by the Sentence of an Ecclesiastical Court, shall have the Custody of any Infant or Access to any Infant, anything herein contained to the contrary notwithstanding."

For American statute along somewhat similar lines, see New Jersey Public Laws, 1902, p. 264, §§ 9, 12; Carson v. Carson (N. J. Ch.) 54 Atl. 149 (1903).

PEOPLE ex rel. SINCLAIR v. SINCLAIR.

(Supreme Court, Appellate Division, First Department, 1904. 91 App. Div. 322, 86 N. Y. Supp. 539.)

Appeal by the defendant, Daniel A. Sinclair, from an order of the Supreme Court, made at the New York Special Term, and entered in the office of the clerk of the county of New York on the 2d day of November, 1903, in a habeas corpus proceeding, awarding to relator the custody of the infant child of the parties to this proceeding.

HATCH, J. The parties to this proceeding were married on or about the 2d day of June, 1896, and lived together as husband and wife until the 2d day of July, 1903. The child, the custody of which is the subject of this controversy, is a boy born March 30, 1900; consequently he will be four years of age in the month of March next ensuing. It is undisputed that the wife is possessed of considerable property and has an independent income of $3,000 a year. About four years ago, by an arrangement between the husband and the wife, she purchased the house No. 809 Lexington avenue in the borough of Manhattan, and paid for and furnished the same exclusively with her own money. In the house the wife caused to be fitted up an office for her husband, who is a practicing physician. The parties resided at this place continuously, living together as husband and wife, until July 2, 1903, at which time the husband left the premises in Lexington avenue, taking the child with him, and went to No. 226 East Sixty-Second street, where his mother and sister resided, and he has continuously resided there since. Upon taking up his residence at this place he requested his wife to come and live with him at that place, which she declined to do. Subsequently she went to the place of residence of the husband, possessed herself of the child and took it with her to a summer residence at Pine Hill, Ulster county, N. Y., where she was spending the summer. On the 7th of August, 1903, the husband again took the child from the possession of the wife and returned with him to his residence in the city of New York. Thereafter and on the 14th day of August of the same year plaintiff sued out this writ, requiring the husband to produce the child before the court. The proof submitted upon the part of the wife tended to establish that she had at all times, while living in Lexington avenue, paid all of the household expenses of the family without aid or assistance from her husband; that she had had almost the sole care and nurture of the child, and had discharged her duties as mother of it with fidelity and for its best interests. It is evident from the proof submitted that the relator is abundantly able to care for and support the child, attend to its proper nurture and training, and nothing appears to cast any discredit upon her fitness or disposition to discharge fully and completely the duties of a mother towards the child, or but that at the residence in Lexington avenue the child will be in all respects well provided for in every matter relating to its future welfare. The husband has received an income from his profession during these years of about $2,500 a year and during the last year it amounted to $2,900. He claims to have given to his wife from $75 to $100 every month, has paid his own personal expenses and bought some clothing for the child. In the main, however, it is quite probable that in the Lexington avenue residence the wife bore the larger share of the burden of supporting the household. The house occupied by the husband on Sixty-Second street is a boarding house, wherein his mother and sister and himself have comfortable quarters, and nothing appears to show that it is not a suitable place of residence for the husband and his family.

The difficulties which have arisen between these parties, it is quite clear, are not due so much to any lack of affection and regard for each other, as it is in the relations which they bear to other persons connected with the respective families, and the more or less officious interference by others, who should have sense sufficient to know that their intermeddling may result in the entire breaking up of a home. The wife has as a member of her household an elderly aunt, who has stood in the relation of a parent to her since early infancy, her own parents having died, and between the aunt and the relator there is a loving affection and regard which such relation has produced. In the household of the husband lives his mother and sister, to whom he is devotedly attached, and upon whom he bestows the affectionate love and regard of a son and brother, and it is quite likely, as is proper for him to do, he devotes some part of his income for their support and maintenance. Between the wife and her aunt on one side and the mother and sister upon the other, there is an estrangement and an antipathy. It is evident that the relatives of the husband are obnoxious to the wife and her aunt, and that the wife's aunt is obnoxious to the husband, his mother and sister. In this condition certain cousins of the wife have interfered, only to breed still further trouble between the husband and wife. Under such circumstances it is quite evident that the wife cannot live in comfort with her husband in the same house with his mother and sister, while the husband has undoubtedly been subjected to many discomforts at the hands of the wife's cousins and perhaps of the aunt in the house of the wife. Therefore it is that these differences have grown up, and we can well understand the perplexing difficulty which the learned judge below found in making disposition of the custody of this infant. There can be no doubt but that under section 40 of the Domestic Relations Law (Laws 1896, c. 272) the court has the authority to award the custody of the child to the mother or to the father. People ex rel. Sternberger v. Sternberger, 12 App. Div. 398, 42 N. Y. Supp. 423. It is the undoubted rule that the husband is regarded in the law as the head of the household and the law awards to him the care and the custody of the children, and charges upon him the duty of their proper care and maintenance as well as the support of his wife. And unless some reason appears the court is not justified in interfering with the law in this regard, but is bound to confirm such right in the husband in the event that the welfare of the child will not be prejudiced thereby. In all cases, however, where the custody of tender infants is involved the prime consideration is the welfare of the child. The right of the husband must always yield to such considerations. Nature has devolved upon the mother the nurture and care of infants during their tender years, and in that period such care, for all practical purposes, in the absence of exceptional circumstances, is almost exclusively committed to her. At such periods of life courts do not hesitate to award the care and custody of young infants to the wife as against the paramount right of the husband where the wife has shown herself to be a proper person and is able to fully discharge her duty toward the child. We do not find it necessary to rehearse in detail all that the record shows respecting the unhappy differences which have arisen between these parties nor to determine with whom lies the greater fault in producing their separation. We have little doubt in concluding that all of their differences might be adjusted if such adjustment involved a consideration of themselves alone. For the present they are living in a state of separation and the custody of the child should be awarded where it will be best cared for. In view of its tender years, that the mother is a proper person and has the disposition to look after its welfare in every respect and is abundantly able pecuniarily to discharge such duty in the fullest extent, we have concluded that the court below was correct in reaching the conclusion that for the present the custody of the child should be awarded to the mother. The order provides that the father of the infant child shall have free access to visit and see it at any and all times, and that he shall be notified of any change made in the abode of the infant. The right of visitation by the father is thus freely and fully preserved and gives to him opportunity to see that the welfare of the child is protected; and that it does not become estranged from him in affection and he can exercise upon it his fatherly care. Changed conditions and the lapse of time will vest in him the right to apply to the court to interpose in his behalf in asserting his rights.

These views lead us to the conclusion that the order should be affirmed, but without costs to either party.

INGRAHAM and McLAUGHLIN, JJ., concurred. VAN BRUNT, P. J., dissents.

LAUGHLIN, J. (dissenting). The facts are sufficiently stated in the prevailing opinion. The authority conferred upon the courts by section 40 of the Domestic Relations Law (Gen. Laws, c. 48; Laws 1896, c. 272) with reference to the custody of minor children where the parents are living apart, even without a judicial decree or a separation agreement, must be construed and applied with due regard to the natural and constitutional rights of the parties. The husband has done nothing to forfeit his right to say where his family shall reside, and the relator has no good and sufficient reason to justify her refusal to live with her husband and son. Nor is it claimed or shown that the father is not kind and affectionate toward his child, or is not able to properly clothe and support him, or is not a fit person to control his bringing up. The husband, in refusing to live in his wife's house, and in selecting another abode, but exercised his legal rights. The relator was welcome to the new home, and was treated by respondent with due consideration, but she would not come or remain. Ordinarily, of course, a child of such tender age should not be deprived of the mother's affectionate care and attention, but the place for the mother is with her husband and child. When she persists in living apart from her husband, merely because she does not like or cannot get on peaceably with his relatives, and prefers to live, by the expenditure of her own fortune, in greater luxury than the husband is able to provide, the court should not, by awarding the custody of the child to her, approve her course and conduct, and thus perhaps unwittingly bring about the permanent separation of the husband and wife. Nothing has occurred between these parties to render it impossible, or even very difficult for them to reside together, and it is reasonable to presume that the mother has sufficient regard and affection for her child, if not for her husband, to return to the child and husband if the court holds that, under existing circumstances, this is her duty, and that she may not upon those facts remove the child from the home the husband has provided for his family.

Order affirmed, without costs.[3]

PEOPLE ex rel. SINCLAIR v. SINCLAIR.

(Supreme Court, Special Term, New York County, 1905. 47 Misc. Rep. 230, 95 N. Y. Supp. 861.)

Motion to vacate order in habeas corpus proceedings, awarding the custody of a child to the relator.

BISCHOFF, J. The facts of this case are quite fully discussed in the opinion rendered by the Appellate Division when affirming the order made herein, awarding the custody of the child to the relator, its mother. People ex rel. Sinclair v. Sinclair, 91 App. Div. 322, 86 N. Y. Supp. 539.

At the time when the order thus affirmed by the Appellate Division, was made, the child, a boy, was three years of age. He is now five years of age, and the respondent moves for an order giving him the custody. So far as the rights and merits of the controversy, which has resulted in the unfortunate estrangement of this husband and wife, are concerned, the situation is the same in all its essential details as it was when the order was originally made giving the custody of the child to the wife, but the sole ground upon which this order was affirmed was that, in view of the tender age of the child, its welfare required that it should receive its mother's care, and that, so far, the paramount right of the father should give way. As was said by the Appellate Division in this case, with reference to the provisions of Domestic Relations Law, Laws 1896, p. 222, c. 272, § 40, whereby the rights and duties of husband and wife with regard to the children are assimilated: "It is the undoubted rule that the husband is regarded in the law as the head of the household and the law awards to him the care and the custody of the children, and charges upon him the duty of their proper care and maintenance as well as the support of his wife. And unless some reason appears the court is not justified in interfering with the law in this regard, but is bound to confirm such right in the husband in the event that the welfare of the child will not be prejudiced thereby."

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[3] Accord: State v. Greenwood, 84 Minn. 203, 87 N. W. 489 (1901). See, also, Campbell v. Campbell, 76 Mo. App. 396 (1898); In re Redmond, 113 Mo. App. 351, 88 S. W. 129 (1905).

While affidavits have been submitted, to some length, by both parties upon the present application, there is no substantial ground for a conclusion that this husband and wife are not equally fit custodians of this child, so far as the matter depends upon their personal qualities, their moral standing and their ability, financially, to accord to the child all that its welfare would require. The separation has been due to the fact that these parties have been unable to agree in their domestic relations. Whether they will be able to come to better accord in the future is a matter which it is not within the power of the court to forecast, but, treating the matter as it is presented, in view of the existing separation, the age of the child and the relative fitness of the parents as its custodians, I must hold that the father, by reason of his paramount right in law, is entitled to the custody of the child at this time. A boy of three years of age may properly be deemed to be of such tender age that considerations of his welfare call for his having a mother's care, but the same cannot be said when the child has reached the age of five. The Domestic Relations Law not having effected any substantial change in the husband's paramount right, founded upon his primary duty to support the family, the case of People ex rel. Barry v. Mercein, 3 Hill, 399, 38 Am. Dec. 644, is an authority directly in point. In that case the court held that the father was entitled to the custody of his child, when the child had reached the age of five years, the custody having theretofore been awarded to the mother by reason of the tender age of the child. Other things being equal, I find no escape from the conclusion that the respondent's claim to the possession of this child at its present age must control. If the question of the child's tender years, as bearing upon the necessity of his having a mother's personal care, is not eliminated at the age of five years, it is difficult to see how it would be eliminated at the age of ten years, and I conclude, therefore, that the "changed conditions and lapse of time," referred to by the Appellate Division as affording the respondent the right to interpose for the assertion of his claim to the possession of the child, are sufficiently present to justify the granting of the relief sought.

Motion granted.[4]

STAPLETON et al. v. POYNTER.

(Court of Appeals of Kentucky, 1901. 111 Ky. 264, 62 S. W. 730, 23 Ky. Law Rep. 76, 53 L. R. A. 784, 98 Am. St. Rep. 411.)

O'REAR, J. This action was instituted by appellee, the mother of John Craig Stapleton, to recover his possession of appellants, his paternal grandfather and grandmother, the lad being then about nine years of age. Appellee is a widow. The father of the boy had died some years previous, leaving no estate, and the widowed mother had none. Appellee, who assumes her maiden name, and W. R. Stapleton were married in 1888, and after a brief and unhappy union of three or four years a separation ensued, being as the record discloses an abandonment of appellee by her husband, who had become dissolute, and who finally lost his life in a drunken brawl. In this distressing situation appellee went with her two children, John Craig, and a girl some two years younger, to the home of appellants. This was before the death of appellee's husband. She continued there some months when it was suggested that the old folks could not well accommodate her longer, but they insisted on keeping the children, to whom they appear much attached, especially the boy. Appellee then sought and obtained employment as a domestic, but desiring the presence of her children above other considerations, left the place, and took them with her to her father's in an adjacent county. Appellant Edward Stapleton and the father of the boy went to her father some two months afterwards, and under promises of reform a reunion of the unfortunate couple was agreed upon, the father and grandfather of the boy taking him back to Laurel county, and the wife and the little girl, to follow in a few days. She did so. But she says that then her husband declined to live with her and declared his only purpose was to regain possession of the boy. Appellee returned to her father's but soon after again sought employment and obtained a situation in a family at Somerset, where her girl had better advantages for attending school. When appellee was first abandoned and was face to face with the proposition of earning her own living, she was induced to sign a contract with appellants concerning her children.

This contract is as follows:

"An article of agreement between Christena Stapleton of the first part, and Ed. Stapleton and Elizabeth Stapleton, his wife, of the second part.

"The party of the first part agrees to give her two children, Craig and Della, to the party of the second part to keep and control as their own until they become twenty-one years old, unless the party of the first part and her husband should live together again, then she is to have her children and not until then. She also gives to the party of the second part all her household goods and horse and cow to be used to the benefit of raising said children and also what W. R. Stapleton her husband left in the house of Mr. Gee, which she was to have in provisions to live on, and the party of the second part agrees to try to give said children a common education.

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[4] Affirmed in the Supreme Court, Appellate Division, 1905, 105 App. Div. 642, 94 N. Y. Supp. 1159.

"This April 30, 1893.
Christena Stapleton.
"Ed. Stapleton.
"Elizabeth Stapleton.

"Att.—Ellen Stapleton.

"I do agree to the above contract. W. R. Stapleton."

Her husband some time after by his indorsement approved it. After the death of her husband, the boy now having grown in size, years and usefulness, and, therefore, helpfulness, she seeks to recover possession of him, and indeed has sought at frequent intervals before this suit to do so, but unsuccessfully until now.

The defense is summed up by counsel for appellants in their brief as follows:

"1st. The appellants, the grandparents of the child, John Craig Stapleton, are the proper persons to have the care, custody and control of said child, and appellee is not.

"2d. That they (appellants) are financially able to care for and educate said child in a manner suited to his station in life, and that appellee is not.

"3d. That said child is possessed of sufficient intelligence and age to judge for himself where he should live, and that it is the desire of said child to remain with its grandparents and not with its mother.

"4th. That on the 30th day of April, 1893, when this child was a mere infant, appellee by a writing surrendered the custody of this child to appellants, and afterwards her husband, its father, agreed to the same contract and signed it.

"5th. That since said time appellants have had the care, custody, and control of said child, and that during all of said time, up to now, they have cared for and treated said child in a manner highly conducive to its best interests.

"6th. That it must be a great hardship to appellants and the child, considering the contract and promises made concerning the child, and the attachments that now have grown up between it and appellants, during this long time for it to be taken from them now."

All these grounds may well be grouped into three classes: First, the child's welfare and wishes; second, the contract of its parents, and third, the equity of the grandparents, appellants.

The welfare of a child, its life, health, and moral and intellectual being, should be and are kept well in view by the courts in determining its legal disposition in litigations over it. This is not upon the ground sometimes supposed that courts of equity will overrule the claims of nature, or substitute their discretion as to the child's welfare, for the responsibilities imposed by God upon the parent. We apprehend, and from an examination of the authorities we gather, this course is justified and applied only in cases where a parent asks the court to change the child's possession, basing his claim upon a legal right, such for example as the legal right of the parent to the custody of his child; then and then only will the court look to the welfare of the child in withholding its aid, basing its action upon the principle that equity will not do a wrong to aid a mere naked legal right. By statutory enactment the legislatures have provided for the State's taking charge of infants in extreme cases, but nowhere has it been held, so far as we are aware, that a parent, however indigent and ignorant, or even vicious, can be deprived by law of the custody of his child at the suit of a stranger, however opulent, charitably disposed, and prepared he may be to give the child advantage of coveted opportunities for its moral or intellectual development. The day may come when society will demand and exercise some such right. Perhaps it may be recognized in milder form by some in legislation for compulsory attendance at schools. But in the broad sense suggested, it certainly is not here yet. We hold that when it is shown by the suing claimant parent that he or she is a person of moral habits, of good health, that is, without contagious or infectious disease, and of enough industry to reasonably insure the child from want and positive distress, these conditions, coupled with the parent's legal right, will overcome the supposed advantages accruing to the child by the adverse claimant, a stranger, who merely shows, that he possesses fortune, character, kindliness and affection for the child, and that, too, even though the court might well consider that the opportunities afforded by the stranger are the most favorable for the infant's welfare. The experience in this country is not that wealth, especially when coupled with indulgence, is always most conducive to a useful education and the foundation of the best character. We apprehend that the best part of the child's "education" will not be obtained at some ideal social institute, beginning with a kindergarten and ending with a university, but generally at the hearthstone of its family, if that family be a proper one.

The "welfare" of the child is not merely training its head, but includes training its heart. Wisdom may be imparted by teaching it to think; the feelings by teaching it to feel. Orphanage, even partial, is generally conceded to be a misfortune, and universally moves to pity, but it likewise carries a privilege and an opportunity. The boy who, taught by the stern lessons of necessity, and the inscrutable ties of fellow suffering and gratitude, to revere his mother, help her bear the burdens of widowhood, and overcome the adversities of untoward conditions, has accumulated an asset of more value, perhaps, than had his disappointed benefactor been allowed to exploit his plans of education at the sacrifice of filial devotion. "Honor thy father and thy mother," is a command, followed by a promise, of peculiar value in determining the "welfare" of the child.

It is argued, and in some instances has been held, that the wishes or election of the infant will be regarded in determining this question. Generally those instances where the wishes of a child of sufficient maturity to realize in a measure its situation, have been allowed to control, were either in a controversy between parents upon their separation, or where the facts of "welfare" were so nearly balanced as to leave the court in grave doubt, in which case the wishes of the child were consulted, and given some weight. However, it has not been held anywhere, so far as we have been cited, that the judgment of the infant is to control independent of or despite other circumstances. We hold that an infant cannot dispose of his property of the smallest value, or become bound by contract generally, because of the conclusive presumption that he has not a sufficiently matured judgment to know what his interests are. We cannot, therefore, hold that in the determination of a question involving such serious and permanent importance to him as the training of his youth, should be at his disposal.

The contract relied upon, in so far as it purports to bind appellee, having been entered into by her while under the legal disability of coverture, was not binding upon her. It was void. We are unable to distinguish it, so far as affecting the feme covert's contractual ability, from any other contract relating to her legal or property rights. If the paper ever had any legal value it was only to the extent of transferring the legal right of the father to the custody of his infants. It could convey at most only such right as he had, which of course terminated with his death. Thereupon the mother's right of exclusive possession began. The record discloses that appellants are estimable and worthy old people, who doubtless would bestow on this grandchild every fair opportunity within their power for its material advancement. Their love for it, natural and cultivated, is clearly shown by the circumstances put in evidence. The separation decreed by the circuit court must seem to them, viewed from their standpoint, as a hardship. These facts are argued by their counsel here as presenting an equity, entitled to be regarded by the court, in connection with the child's welfare, in decreeing its custody. The utmost the court could be expected to do would be to measure the "equities" of these contending parties. It requires no judicial determination to properly estimate the mother's love, probably the strongest instinct of the species. This temporary separation, enforced by conditions beyond her control, instead of weaning her from the child appears to have intensified her yearning. As between the two, the grandparents and the mother, we do not feel at liberty to change the responsibility of the parent, and the privilege and duty of the child, from where God has placed them.

The judgment of the circuit court is, therefore, affirmed.[5]

[5] Accord: Cormack v. Marshall, 122 Ill. App. 208 (1905); Gilmore v. Kitson, 165 Ind. 402, 74 N. E. 1083 (1905); State v. Deaton, 93 Tex. 243, 54

HUSSEY v. WHITING.

(Supreme Court of Indiana, 1896. 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220.)

From the Gibson Circuit Court. Affirmed.

HACKNEY, J. This was a proceeding by habeas corpus for the custody of Ray Hussey, a little girl thirteen years of age, and was instituted by the appellee, her maternal grandfather, against her father, the appellant. The decree of the lower court was in favor of the appellee, and the appellant submits the case to this court, by his appeal, upon the evidence.

It may be fairly said that, by a clear preponderance of the evidence either party entertains a deep affection for the child, and might reasonably be intrusted with her moral training. Since the death of her mother, some six years before the disagreement which resulted in this proceeding, she resided with her grandparents, who were possessed of a large, comfortable home, and lands of the value of $20,000.00 or more, and were willing and prepared to render every care and comfort necessary to the welfare of the child. During the period mentioned the appellant continued, and still is, a widower, with little means above his indebtedness, but with an average income of $50.00 per month from his business. Until he took the child from her grandparents he made his home with them, but his business, that of traveling salesman, required him to be absent from five to six days each week. He paid for his own boarding and supplied most of the material for clothing the child, but her boarding and care, and the making of her clothing were supplied by her grandparents. The appellant and the child took up their home with the appellee, pursuant to a request from Mrs. Hussey, while upon her deathbed, that they should have a home with, and that the child should be raised by, the appellee and his wife. The parties differ as to the conversation at the time of this request, as to whether the appellant simply acquiesced in the request and the appellee's promise, or whether he declined to "give" the child to her grandparents. But there is no disagreement about the fact that the appellee and his wife cared for the child as a member of their family, and became greatly attached to her, and that the appellant took her from them, not by reason of any neglect or mistreatment of her, but because he and his mother-in-law at times, disagreed and had bitter words as to his own relations to the household, and because he, without just cause, thought that the child was becoming estranged from him by the influence of her grandmother. When she was taken from the appellee's home she was taken to the home of the appellant's married sister, who lived in the town of Princeton, where the appellee lived al-

S. W. 901 (1900); Watts v. Lively (Tex. Civ. App.) 60 S. W. 676 (1901); Giffin v. Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25 (1900); Dunkin v. Seifert, 123 Iowa, 64, 98 N. W. 558 (1904).

so. The sister, Mrs. Eby, owned and lived in a house of four rooms; her husband labored at $1.25 per day; there were four members of her family and a boarder five days in the week when the appellant and his daughter took up their new abode with her. Mrs. Eby was a kind-hearted woman, affectionate with children and favorably disposed towards the little girl; she performed all of the duties of her household without a servant, and, while her circumstances were not the best, she was a fit woman to have the care and moral training of the child. Mrs. Hussey had died of consumption, and the child was delicate and evidently predisposed to that disease.

Ordinarily the father is entitled to the custody of his minor children. This was the rule of the common law, and is affirmed by statute in this State, but, where the welfare of the child is retarded by the custody of the father, an exception to the ordinary rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of a parent. Jones v. Darnall, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545; Sheers v. Stein, 5 L. R. A. 781, and note; s. c. 75 Wis. 44, 43 N. W. 728; Joab v. Sheets, 99 Ind. 328; Schouler, Dom. Rel. § 248; U. S. v. Green, 3 Mason, 482, Fed. Cas. No. 15,256; Bryan v. Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309.

The oral agreement, express or implied, that the appellee should have the custody of the child during her infancy would not preclude the appellant from reclaiming her custody. Brooke v. Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. The conclusion of the trial court, therefore, must have been reached upon the theory that the welfare of the child would be best promoted by remanding her to the custody of the appellee, and it remains for us to determine, upon the facts stated, whether that view of the case is supported.

Considering the delicacy of her health, the care and attention she requires on that account; the comforts of the spacious home of her grandparents; their relationship to, and affection for her; the understanding of her health, disposition and habits, acquired during the six years they have had the care of her, present a very strong claim in favor of their continued custody of her. The father's situation and business afford her no home with him, and, at best, from his standpoint, he can but supply her a home and its comforts by purchase, and with but little of his society. The home which he claims to be not less conducive to the welfare of the child than that from which he took her, is, no doubt, modest and reasonably comfortable under the circumstances, but certainly Mrs. Eby's obligations to her own immediate family, including her two children, would not afford her the time to bestow careful attention to the needs and wants of the child, and the crowded condition of her home of four rooms would certainly not be so conducive to the health of the child as that of her grandparents.

The conclusion of the trial court was not a mere discrimination between the luxuries of wealth on the one side and the modest comforts of an ordinary home on the other; nor was it a simple denial of the right of a father to have the care, custody, and training of his minor child. It was a recognition of the fact that a child requiring unusual care could probably not receive it and that her father sought to remove her, not to his own custody, but to that of another, whose situation in life was not so conducive to the health and general welfare of the child as with her grandparents.

The decree of the circuit court is criticised by counsel because of its having provided that the appellant should, "at proper times" be permitted to visit his child, without defining the phrase "proper times." The criticism, we presume is made upon the assignment of error that "the court erred in overruling the appellant's motions to modify the judgment." There were numerous motions to modify the judgment, severally filed and severally overruled, some of which were properly overruled, and it is not even claimed in argument that all were improperly overruled. There is, therefore, no available error.

The judgment is affirmed.[6]

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[6] Accord: McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406 (1899); McDonald v. Stitt, 118 Iowa, 199, 91 N. W. 1031 (1894); United States v. Savage (C. C.) 91 Fed. 490 (1899); Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623 (1898); State v. Anderson, 89 Minn. 198, 94 N. W. 681 (1903); Ex parte Davidge, 72 S. C. 16, 51 S. E. 269 (1905).

Note on the Effect of Parents' Agreements as to the Custody of the Child. (1) The parent's agreement as to the custody of the child can never be used to affect unfavorably the best interests of the child. Hence, whenever it is for the best interests of the child that it be restored to its parent, the agreement will not prevent such a step being taken. Carpenter v. Carpenter, 149 Mich. 138, 112 N. W. 749, 14 Detroit Leg. N. 366 (1907). See, also, Hibbette v. Baines, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839 (1900). (2) The agreement can never be effective to transfer to another the superior right of a parent, so that, all things being equal, the stranger will have a right to the custody of the child as a parental right, even to some extent against the child's most selfish interests. Hibbette v. Baines, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839 (1900); Hernandez v. Thomas, 50 Fla. 522, 39 South. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137 (1905). (3) As to whether the agreement, even though not strictly a contract, can operate as a waiver of the parental right of custody, so as to permit the continuance of the actual custody of the child in a third party, to be decided wholly with reference to the most selfish interests of the child, the cases are conflicting. That the agreement can be so treated, see Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623 (1898); State v. Deaton (Tex. Civ. App.) 52 S. W. 591 (1899); Fletcher v. Hickman, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896, 88 Am. St. Rep. 862 (1901); Carter v. Brett, 116 Ga. 114, 42 S. E. 348 (1902); Baskette v. Streight, 106 Tenn. 549, 62 S. W. 142 (1901); Lamar v. Harris, 117 Ga. 993, 44 S. E. 866 (1903); Ousset v. Euvrard (N. J. Ch.) 52 Atl. 1110 (1902). Cases that it cannot: Casanover v. Massengale (Tex. Civ. App.) 54 S. W. 317 (1899); Cormack v. Marshall, 122 Ill. App. 208 (1905); In re Galleher, 2 Cal. App. 364, 84 Pac. 352 (1905); State v. Anderson, 89 Minn. 198, 94 N. W. 681 (1903); Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500 (1898).

Note on Right of Parent to Direct the Religious Training of the Child. In re Scanlan, L. R. 40 Ch. 200 (1888); In re Marshall, 33 Nova Scotia, 104 (1900); In the Matter of the Guardianship of Jacquet, 40 Misc. Rep. 575, 82 N. Y. Supp. 986 (1903).

ROWE v. RUGG.

(Supreme Court of Iowa, 1902. 117 Iowa, 606, 91 N. W. 903, 94 Am. St. Rep. 318.)

Appeal from Iowa District Court. Hon. M. J. Wade, Judge.

Action to recover damages for an assault and battery. Trial to a jury, and verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

SHERWIN, J. This is an action by a child of eight years of age to recover of the defendant, who is his aunt, damages for corporal punishment administered by her. That she moderately chastised the child was admitted by the defendant, and the jury found that it was not, in fact, excessive. It conclusively appeared that it was authorized by the plaintiff's mother, and the only questions before us are whether the mother has such authority over her own child during the life of her husband, and while he is the head of the family, that she may delegate her power in the premises to another, and whether one acting under such delegated authority may legally inflict moderate punishment upon a minor child.

We first inquire whether either parent may legally authorize a third person to administer such chastisement to their child as they might themselves lawfully inflict. It is the general rule that those having the care, custody, and control of minor children may, for the purpose of proper discipline and control, administer such moderate and reasonable chastisement as shall effect the desired object, and this rule has been applied generally to all those occupying a position in loco parentis. The law continually looks to the future of the child, as well as to its present condition; and it is its policy, in dealing with the various questions which are constantly arising affecting its care and custody, to determine the line of action that shall best subserve its present and future welfare. The duties which the parent owes to the child as well as to the public, in the matter of its maintenance, protection, and education, have generally been held to give the parent or other person occupying such relation the power to thus discipline and correct it. While we are not prepared to hold that a parent may, without restraint, lawfully authorize any and all persons to administer physical punishment to his or her child, we see no reason why such authority may not be given under certain circumstances. For instance, if a child is placed in the temporary care of some person, in whom the parent has great confidence, on account of relationship or otherwise, why may not authority to properly correct the child be delegated for the time being? Or suppose a parent is physically unable to administer needed punishment; why may he not legally direct a friend to do so for him? The child and society are as fully protected in such case as in one where the punishment was administered by the parent, because, if immoderate and unreasonable, the same consequences would follow in both cases. And on the other hand, the failure to correct might be detrimental to the child. As bearing upon this question, see Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810.

The mother, under section 3192 of the Code, is "equally entitled to" the "care and custody" of the children. This must necessarily mean that she is also equally entitled to control and discipline them. Being given this power, it must follow that, if the father may authorize another to punish his child, the mother may do so.

The instructions of the trial court were in harmony with these views, and the judgment is affirmed.[7]

PEOPLE ex rel. SCHWARTZ v. McLAIN.

(Supreme Court of Illinois, 1905. 38 Chi. Leg. N. 166.)[8]

Boggs, J. This is a petition for a writ of habeas corpus, filed originally in this court. The petition avers that Samuel Schwartz, a son of the petitioner of the age of fourteen years, is unlawfully restrained of his liberty by the respondent, Nelson W. McLain, in his official capacity of superintendent of the St. Charles Home for Boys.

It appears from the pleadings on which the cause has been submitted for decision, that the relator, Joseph Schwartz, is a resident, and on the 20th day of June, 1905, was a resident of the city of Chicago; that he was the head of a family consisting of himself, his wife, Rachel, and their son, Samuel; that he, the relator, provided his wife and said Samuel, his son, with a comfortable, quiet and orderly home, and maintained and supplied them with food and clothing and supplied said Samuel with books and stationery, etc., and caused him to attend the public schools, and that relator in all respects performed and discharged his duties as parent toward said Samuel, and that he, the relator, is a reputable and law-abiding citizen, and that the parents of said Samuel have not been guilty of any act inconsistent with the correct and moral control and custody of their son; that on that day a complaint or petition was filed in the Circuit Court of Cook County, on the chancery side thereof, charging said Samuel with two violations of the provisions of section 55 of the Criminal Code of the State, in that he made "repeated indecent assaults upon Jennie Coliff and other repeated and indecent assaults upon one Fanny Cohen, all within the past two months and in the city of Chicago, county of Cook and State of Illinois; that the said Jennie Coliff and said Fanny Cohen were then and there at the time of said assaults, and each of them was, a female child under the age of fourteen years; that the said Jennie Coliff then and there resided at 72 Wilson street, in said city of Chicago, county of Cook and State of Illinois; that said Fanny Cohen then and there resided at 88 Wilson street, in said city of Chicago, Cook county, Illinois; that said assaults were, and each of them was, publicly committed in the rear of 92 Wilson street, in said city of Chicago, Cook county, Illinois, and said assaults were, and each of them was, an act of disorderly conduct and a notorious act of public indecency tending to debauch the public morals"; that subsequently, in pursuance of proceedings in the said Circuit Court under said petition, a decree was entered finding said Samuel guilty of the acts of disorderly conduct and of public indecency tending to debauch the public morals, charged against him and in violation of said section 55 of the Criminal Code, and declaring said Samuel to be a ward of said court and ordering that he be committed to the St. Charles Home for Boys, there to remain until he should arrive at the age of twenty-one years, unless sooner discharged according to law, and that the respondent restrains said Samuel in said home for boys in virtue of this order of the court.

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[7] Accord: Even where the child was disciplined by one standing in loco parentis. Fortinberry v. Holmes, 89 Miss. 373, 42 South. 799 (1907). Compare, however, Foley v. Foley, 61 Ill. App. 577 (1895).

[8] This case is not reported in the official Illinois Reports, for the reason that a rehearing was granted; and before any further action was taken the petition was dismissed upon motion of the petitioner.

It appears from the transcript of the proceedings that the order that the boy Samuel should be taken from the custody of the relator, his father, was not on the ground that the relator had in any way failed to provide or care for the said Samuel or had neglected to exercise proper restraint over him, or that his habits or conduct were injurious to the moral or physical interests of the boy, but solely on the ground the boy had, by disorderly conduct and the acts of public indecency before mentioned, violated section 55 of the Criminal Code. The relator and his wife, Rachel, the mother of the boy, were cited to bring Samuel, the son, before the court to answer the charges of disorderly conduct and acts of public indecency, but were not made parties to the proceeding, nor were there before said court any charges of the omission of parental duty and care preferred against them, nor did the order entered by the court proceed on the theory the relator or his wife, Rachel, had by any parental delinquencies lost the right to keep their son in their family and rear their boy and enjoy his society and receive the benefits of his labor and services. The decree that the boy shall be the ward of the court and should be taken from his home and the custody and care of his parents was based solely on the ground that the boy had committed the misdemeanors aforesaid in violation of the provisions of said section 55 of the Criminal Code, the violation whereof said section 55 provides shall be punished by the infliction of a fine in any sum not exceeding $200 for each offense.

The proceedings in the Circuit Court which resulted in the decree committing the said Samuel Schwartz to the St. Charles Home for Boys was in pursuance of one of the provisions of the act of the General Assembly entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," in force July 1, 1899. 4 Starr & C. Ann. St. Supp. 1902, p. 375. In order to accomplish the purposes indicated in the title, the act provides that a petition in writing, verified by affidavit, may be filed in the Circuit or County Court, setting forth facts showing that a child in the county is either neglected and dependent or delinquent, and praying for proceedings to be had and taken under said petition for the disposition of such child as shall be found to be neglected and dependent or delinquent. Section 1 of the act defines a delinquent child as follows: "The words 'delinquent child' shall include any child under the age of sixteen (16) years who violates any law of this State or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill-fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated." Section 9 of the act purports to authorize the court to commit any child so found to be delinquent, if a boy, to a training school for boys, or to "any institution within the county, incorporated under the laws in this state that may care for delinquent children, * * * or to any state institution which may be established for the care of delinquent boys." It was in virtue of this provision of the said act that the said Samuel Schwartz was ordered by the Circuit Court of Cook county to be taken from the custody of the relator, his father, and committed to the care of the respondent, as the superintendent of the St. Charles Home for Boys, on the ground that the boy had violated, in the manner hereinbefore related, the provisions of said section 55 of the Criminal Code, and had thereby become deemed to be a delinquent boy within the meaning of said statute.

If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of sixteen years who has committed a misdemeanor punishable under the Criminal Code of the state by fine, or who has violated an ordinance of any city or village of the state, and take him from his home and from the custody of his father and the care of his mother and commit him to a state institution which may be established for the care of delinquent boys and there keep and train and raise him, though the father may have always provided a comfortable, quiet, orderly and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render to him all of the duties of a parent. We do not think it is within the power of the General Assembly to thus infringe upon parental rights. At the common law and at the time of the adoption of the constitution of 1870, the father possessed the legal right to the care, custody and control of his minor children and was entitled to the services and earnings of such children. These parental rights cast upon the father, as a corresponding obligation, the duty to maintain, support and educate the children and to treat them with kindness and affection. Section 1 of the Bill of Rights (Const. 1870, art. 2, § 1) guarantees protection to the inherent and inalienable rights of men, among these rights being "the pursuit of happiness," and section 2 of the same article of the constitution protects the parent against the destruction of his property rights in the services of his child without due process of law.

The right of the parent to the care and custody of the child has its foundation in the love and affection which nature has implanted in the heart of the father for his offspring. It is one of the strongest and deepest emotions of the human mind and heart, exists as a prompting of nature for the protection and safety of the child, and conduces largely to the happiness of the parent. It is difficult to define "pursuit of happiness" but it is clear it comprises the right to enjoy the "domestic relations and the privilege of the family and the home." Black on Constitutional Law, § 204. To guarantee to a parent the right to the pursuit of happiness forbids that he should be deprived of the right to the custody, the association and the society of his child, or of his right to teach and train the mind of the child and fit it for the walks of life, unless considerations affecting the public welfare require such rights shall be abridged or surrendered for the general good of the state. The parent may, by reason of his failure to appreciate and perform that which is requisite to the moral, intellectual and physical welfare and development of the child, forfeit his right to the custody and care of his child. The public welfare is concerned in the culture, education and moral training of children, and the state may supplant the parent as custodian and protector of the child if the delinquencies or unfitness of the parent require that the child shall be deemed the ward of the court, acting for the public. The child may be found to be so possessed of and controlled by wicked degeneracy or so incorrigibly evil, and the parent so indifferent to the moral and intellectual growth of the child or so otherwise unfit to be entrusted with the power to train and cultivate the mind and conscience of the child, that it may become lawful to commit the child to the public care and custody. In such an event the right of the parent may be deemed secondary to that of the general public as organized for the safety and welfare of mankind. But no such public considerations are here shown to exist. The boy Samuel has been shown to be guilty of offenses which in an older and more matured person would be but a misdemeanor, punishable only by a fine of not exceeding $200 for each offense. He is not a dependent, neglected child. His father has not by any act or omission on his part forfeited his right to care for and enjoy the society of and train his son for the duties and responsibilities of manhood. That extraordinary exigency which may justify the state in supplanting the father as the natural custodian and protector of his son does not here exist.

The property right of the father in and to the services and labor of his son during his minority would also, under the circumstances of this case and under the proceedings here under consideration, to which the father was not a party, be unlawfully infringed by the assumption on the part of the state of the control and custody of the son on the mere ground that the son had committed the misdemeanor in question. The statute here relied upon to justify the detention of said Samuel as a delinquent child, under the circumstances of the case, infringed the constitutional rights of the father and can not be enforced. What is here said has no reference to the statute regulating the disposition to be made of "dependent or neglected" children.

Moreover it is to be understood we do not hold the statute regulating the disposition to be made of delinquent children to be unconstitutional in toto and as to every parent or as to all children, but that under the circumstances of this particular case constitutional rights of the father have been infringed, and therefore the detention of Samuel Schwartz in the St. Charles Home for Boys cannot be justified or upheld.

There is no force in the contention so strenuously advanced by counsel for the relator that the proceedings under this statute are criminal proceedings, and that a boy who is the subject of judicial investigation under this statute is entitled to a trial by a jury of twelve men. The proceeding is statutory, and its object is not the enforcement of the criminal law but the protection of children. Infants are, in general, in a sense wards of courts of chancery, and the practice and procedure in causes under this statute, affecting, as they do, the care and custody of minors and being for the protection of infants, should be that of courts of equity so far as consistent with the provisions of the statute. The commitment to the home for boys, in cases in which the statute is applicable and is properly enforced, is not imprisonment as punishment for the violation of the criminal laws of the state or the ordinances of cities and villages, but is merely the assumption by the state in its capacity of parens patria, of parental authority for the education and reformation of the child, and the home for boys is not to be regarded as a prison, but is, in fact, a home and a school established by law for the benefit and good of those who are found, under the provisions of the statute, to stand in need of parental care and means of reformation and intellectual and moral training. Such is the general view of statutes and institutions of this character. Petition of Ferrier, 103 Ill. 367, 43 Am. Rep. 10; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; House of Refuge v. Ryan, 37 Ohio St. 197; Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388; Scott v. Flowers, 60 Neb. 675, 84 N. W. 81; In re Mason, 3 Wash. St. 609, 28 Pac. 1025.

The provisions of section 2 of the act prescribing the procedure as to trial by jury is constitutional and valid. Petition of Ferrier, supra.

The judgment of this court will be, that the detention of said Samuel by the respondent, in his official capacity as superintendent of the St. Charles Home for Boys, is without sufficient warrant of law, that the relator is entitled to the custody of said Samuel, his son. Judgment will therefore be entered awarding the custody of said Samuel Schwartz to the said relator according to the prayer of his petition. Writ granted.[9]

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[9] See note on Constitutionality of Juvenile Court Acts, 19 Harv. Law Rev. 374; also The Juvenile Court, by Hon. Julian W. Mack, Minn. State Bar Ass'n Reps. 1907; Ex parte Loving, 178 Mo. 194, 77 S. W. 508 (1903); In re Brown, 117 Ill. App. 332 (1904); State v. Kilvington, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284 (1898); Wadleigh v. Newhall (C. C.) 136 Fed. 941 (1905).

In view of the above opinion, together with the decision of the court in Sullivan v. People ex rel. Heeney, 224 Ill. 468, 79 N. E. 695, post, p. 112 (1906), the Juvenile Court Act was amended (Laws Ill. 1907, p. 70). The amendments were drafted under the supervision of Judge Julian W. Mack.

CHAPTER II

OBLIGATION OF PARENT TO SUPPORT CHILD

SHELTON v. SPRINGETT.

(Court of Common Pleas, 1851. 11 C. B. 452.)

Assumpsit for meat, drink, washing, lodging, and other necessaries found and provided by the plaintiff for the defendant's son.

Plea, non assumpsit.

At the trial at the sheriff's court, London, on the 29th of May last, it appeared, that the plaintiff kept a coffee-house in the Minories; that the defendant, who was the manager of the Tenterden branch of the London and County Joint-Stock Bank, in April, 1850, sent his son, a youth of the age of twenty years, to London, to look out for a ship, giving him £5., and telling him to put up at an hotel called Burrell's Hotel, at which he himself was in the habit of putting up when he came to town; that, after staying at Burrell's Hotel for a week, at an expense of £3. 9s. (which sum he procured from a friend of his father's), the defendant's son went to the plaintiff's coffee-house, and remained there fifteen weeks.

The son, who was called as a witness, stated that he went to the plaintiff's house without his father's knowledge; that he was recommended by some one to go there, as it would be more economical, and nearer to the docks than the house to which his father had desired him to go; that he had addressed two or three letters to his father, but had received no reply; that he could not say how he had spent the £5. which his father had given him, but no part of it in board and lodging.

Some correspondence was then put in, but it contained nothing from which a contract or promise on the part of the defendant to pay for his son's board and lodging, could be implied.

For the defendant it was submitted, on the authority of Mortimore v. Wright, 6 M. & W. 482, that the moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and that he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them; and, consequently, that here there was no case to go to the jury.

On the other hand, reliance was placed upon Baker v. Keen, 2 Stark. N. P. C. 501, where it was held, that, where a minor orders articles which are necessary, and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given by the father to the son so to contract.

The undersheriff, reserving to the defendant leave to move to enter a nonsuit, left the case to the jury; telling them that it was incumbent on the plaintiff to shew that the defendant had given authority to the son to pledge the defendant's credit, and that the board and lodging had been supplied on the credit of the defendant.

The jury returned a verdict for the plaintiff, damages £15. 15s.

JERVIS, C. J. I am of opinion that this rule must be made absolute. It is well settled that a father is not, without some contract express or implied, liable for necessaries supplied to his son. Lord Abinger, in Mortimore v. Wright, says: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law." To that doctrine I entirely subscribe. If a father turns his son upon the world, the son's only resource, in the absence of anything to shew a contract on the father's part, is, to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty. The simple question, therefore, in this case, is, whether there was any evidence whatever of authority to charge the defendant. The evidence is, that the father starts his son for London in search of a ship, with £5. in his pocket, and advises him to go to one hotel, and the son goes to another. There really was no evidence to go to the jury—that is, no reasonable evidence which ought to have been submitted to the judgment of the jury.

MAULE, J. I am of the same opinion. People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is, then, the son to be left to starve, —the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts. Upon the evidence in this case, it is clear there was a total absence of authority in the son to contract on the part of the father the debt now sued for. (The plaintiff originally contracted with the son, intending to trust to him for payment.) There is nothing in the correspondence from which we can infer an intention on the father's part to confer authority upon the son to contract a liability for him. The letter written by the defendant's attorney does not admit, or give any colour of admission of, an original liability. I think there is not even what is called a scintilla of evidence. But it is quite clear that there is not such evidence as would justify a jury in finding a verdict for the plaintiff. I therefore agree with my lord, that the rule must be made absolute to enter a nonsuit.

CRESSWELL, J. I am entirely of the same opinion. The undersheriff ought to have nonsuited the plaintiff, or told the jury that there was no evidence to warrant them in finding for him.

TALFOURD, J., concurred.

Rule absolute.[1]

BAZELEY v. FORDER.

(Court of Queen's Bench, 1868. L. R. 3 Q. B. 559.)

[BLACKBURN, J.[2] The husband is liable for necessaries supplied on credit to the wife when living apart owing to his misconduct. The 2 & 3 Vict. c. 54, says, if the Court of Chancery thinks it right, she shall carry the children under seven years of age with her as part of her family. Does not this impliedly say that the husband shall be liable for necessaries for the children, just as he would be for necessaries for the wife?]

If the legislature had intended to impose this liability, it would have provided such an enactment for the purpose, as it has done in similar cases. The wife can obtain a judicial separation and obtain a proper allowance.

[BLACKBURN, J. That argument goes too far, because it would equally apply to the case of necessaries for the wife herself.]

Cur. adv. vult.

July 3. The following judgments were delivered:

BLACKBURN, J. The judgment I am about to deliver is that of my Brothers MELLOR and LUSH, and myself.

In this case the plaintiff obtained a verdict for a small sum, subject to leave to enter a verdict for the defendant if there was no evidence proper to be left to the jury.

It appears by the secondary's notes that the plaintiff by order of the defendant's wife supplied clothes for the defendant's child; but it also appears that the wife was living separate from the defendant, and that the child who was under seven years of age was residing with her against the defendant's will, the Master of the Rolls having, in exercise of the powers conferred on him by the 2 & 3 Vict. c. 54, made an order that the infant should be in her custody. There was some evidence that the defendant's wife had been driven from him by his misconduct. In justice to the defendant's character it should be observed that it was very slight, and that it is not improbable that, if the pecuniary demand had been so large as to make it worth his while to undertake the odious task, he might have shown that the separation was voluntary on the wife's part; but we have only to consider whether there was any evidence for the jury. There was some evidence that the wife had some separate property, but the jury found (and on the evidence were justified in finding) that it was inadequate to support the wife according to her husband's degree.

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[1] Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538 (1841); Gotts v. Clark, 78 Ill. 229 (1875); McMillen v. Lee, 78 Ill. 443 (1875); Dumser v. Underwood, 68 Ill. App. 121 (1896); McCrady v. Pratt, 138 Mich. 203, 101 N. W. 227 (1904); Peacock v. Linton, 22 R. I. 328, 47 Atl. 887, 53 L. R. A. 192 (1901).

For an instance where the court went very far in finding an authority from circumstantial evidence, see Lamson v. Varnum, 171 Mass. 237, 50 N. E. 615 (1898)

[2] Only the opinions of the judges are given.

A wife, when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses, according to her husband's degree, unless she is in some other way supplied with the means of providing them. If, therefore, the plaintiff's claim here had been for reasonable apparel supplied to the wife herself, or for the supply of food for her household servants, such as according to her husband's degree would be reasonable, there was evidence sufficient to be left to the jury in support of his claim to charge the husband. And the only question remaining is, whether, the wife having the custody of the infant, against the husband's will, but by force of an order made under the statute, the reasonable expenses incurred in providing for the infant are part of the wife's reasonable expenses within the meaning of the rule of law. If they are, there was evidence that the defendant's wife was separated from the defendant under such circumstances as gave her, by law, authority to pledge her husband's credit for them, and the verdict must stand; if they are not, I do not see any legal principle on which the defendant can be made liable.

There is, I believe, no authority or case bearing on the point; but, I think, on principle, that as soon as the law became such that a wife separated from her husband might properly and legally have the custody of her infant children under the age of seven years, though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that in one sense, this is an expense voluntarily incurred by the wife, as she is not obliged to ask for, or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur.

The wife of the richest subject in the realm, when driven from her husband's roof, is not obliged to have servants or clothes suitable to her degree. If she chooses to clothe herself economically, and dispense with attendance, she may do so; yet I apprehend it will not be disputed that she may bind her husband by ordering clothes, and hiring servants reasonably fit for her degree; and if her husband's station be high enough to make it reasonable, ordering liveries for those servants. All those expenses are voluntary in one sense, for if the wife chooses she need not incur them. I cannot but think that the very object of the statute was that a wife should not be compelled to do violence to her feelings as a mother by parting from her infant child, when she was not in fault; and that when she does choose to keep her child, and is by law empowered to do so, the expenses necessarily incurred in doing so are necessary and reasonable, having reference to her station, not merely as the wife of a person in the station of the defendant, but as the wife properly having the custody of the infant children of the marriage.

It is argued that if this is so, the liability of the father is changed, for a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health, whilst, if there is any authority given by law to the wife, it is to pledge the husband's credit for such necessaries for the child as may be reasonable with reference to the husband's station. This is true, but the same remark applies to the wife. A husband, whilst his wife resides with him, chooses his own style of life, at least in theory. In the quaint language of Hyde, J., in Manby v. Scott, 1 Mod., at page 138, if "the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat is as fashionable, and fitter for his quality," the husband is to decide, and neither the wife nor a jury, it may be, consisting of drapers and milliners. But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of the husband's liability only comes into play when he is in fault, and so is not unjust. I think the increased liability incurred in respect of the wife having the custody of the children falls within the same principle, and therefore I think that this rule should be discharged.

Cockburn, C. J. I am compelled in this case to differ from the rest of the Court. The action is brought to recover the price of necessaries in the way of clothing supplied to the child of the defendant, while living with the mother, who is separated from her husband the defendant. The wife, having left the husband for reasons which for the present purpose we must take to have been sufficient to justify her doing so, obtained from the Master of the Rolls an order under the 2 & 3 Vict. c. 54, that the child, being under the age of seven years, should be placed in her custody. Not having the means of maintaining the child, the mother procured the necessaries in question for the child on credit, and the present action having been brought to recover the price, the question which presents itself is whether the defendant is liable in respect of the necessaries so supplied. I am of opinion that he is not.

It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation. "It is a clear principle of law," says Parke, B., in Mortimore v. Wright, 6 M. & W., at page 488, "that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability." It is clear that if the child had been living in the father's family, the father would not have been liable for necessaries supplied to it by a third party on his omitting to provide them. A fortiori, there would be no such liability where the child was living against the father's will, with another person. Can it make any difference that the child is living, equally against the father's will, with the mother? If both mother and child were living as part of the father's family, the wife would not have authority to pledge the husband's credit for necessaries supplied to the child contrary to the husband's will. Can she do it any the more because she and the child are living apart from him?

It is admitted that there is no direct liability on the father in respect of articles supplied on credit as necessary to the child; but it is said that articles thus supplied for the use of the child may be treated as necessaries to the mother. The difficulty I have in adopting this view arises from the fact that there is no obligation on the part of the mother to take the child at all. It is on the petition of the mother that an order is made as to the custody of the child under the 2 & 3 Vict. c. 54. It is optional with the mother to apply for such an order. And though it is true that a married woman, separated from her husband, may, under such circumstances as the present, incur expenses, as necessary to the degree and means of the husband and herself, which, if she were living in the husband's household, it would be in his power to refuse her, I cannot see any analogy between things which are necessary to the degree and station of the wife and the expense incidental to the maintenance of a child; the keeping of such child by the mother, instead of leaving it with the father, not being, so far as I can see, in any sense, a thing necessary to the mother. The fact is that a case has arisen for which the law has not made provision. It does not seem to have occurred to the legislature, on passing the 2 & 3 Vict. c. 54, that there might be cases in which a mother, to whom the custody of a child was committed under the statute, might not have the means of supporting it. It does not appear to me that we can properly supply the defect by extending the fiction of law, that a wife, leaving her husband for sufficient cause but against his will, is armed by him with authority to pledge his credit for necessaries, to the case of necessaries supplied to a child. That fiction was resorted to owing to defect of our law which afforded to a married woman, though deserted by her husband, or compelled by his conduct to quit his roof, no means of compelling her husband to provide for her, unless she proceeded for a divorce a mensa et thoro, and obtained alimony. Under a system of law more perfectly and completely dealing with the relation of husband and wife, a court, having cognizance of matters relating to this relation, would have authority to afford redress to a married woman under the circumstances referred to, even without an application for a divorce or judicial separation. If the law were in this case what it should be, the question as to provision to be made by the father for children properly in the custody of the mother would be taken into consideration and fixed by competent authority. I do not think that we can meet the case now arising from want of legislation on the subject by straining the law relating to the liability of a husband for necessaries supplied to a wife living apart from him, so as to make it embrace necessaries supplied to a child, for which, if the child were living with him, he would not be liable. In doing so it seems to me that we should be legislating to meet a case in which the law is insufficient. This I think we cannot properly do, and I am therefore of opinion that the rule should be made absolute; but my learned Brothers being of a different opinion the rule will be discharged.

Rule discharged.[3]

GILLEY v. GILLEY.

(Supreme Judicial Court of Maine, 1887. 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307.)

VIRGIN, J. Assumpsit by the mother against the father for their young children's necessary support furnished after a divorce a vinculo decreed to her for his "desertion and failure to support," he having been absent from the state several years prior to the decree and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves. Benson

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[3] Accord: Reynolds v. Sweetser, 15 Gray (Mass.) 78 (1860); Walker v. Laighton, 31 N. H. 111 (1855); Quigley v. Murphy, 4 Ohio N. P. 1 (1896); Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627 (1902).

Observe the doctrine that when the husband and wife live apart by reason of the fault of the husband, and the husband voluntarily allows the wife to take the children with her, there is by reason of that fact alone evidence of an actual authority to pledge the husband's credit for necessaries for the children as well as for the wife. McMillen v. Lee, 78 Ill. 443 (1875); Ruinney v. Keyes, 7 N. H. 571, 580 (1835); Grunhut v. Rosenstein, 7 Daly (N. Y.) 164 (1877); Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73 (1856).

v. Remington, 2 Mass. 113; Dawes v. Howard, 4 Mass. 98; Nightingale v. Withington, 15 Mass. 274, 8 Am. Dec. 101; State v. Smith, 6 Me. 462, 464, 20 Am. Dec. 324; Dennis v. Clark, 2 Cush. (Mass.) 352, 353, 48 Am. Dec. 671; Reynolds v. Sweetser, 15 Gray (Mass.) 80; Garland v. Dover, 19 Me. 441; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Furman v. Van Sise, 56 N. Y. 435, 439, 445, 446, 15 Am. Rep. 441; 2 Kent's Com. *190 et seq.; Schoul. Dom. Rel. 321.

In Dennis v. Clark, supra, the court said: "By the common law of Massachusetts, and without reference to any statute a father if of sufficient ability is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England to support and provide for his wife. And if a husband desert his wife or wrongfully expel her from his house and make no provision for her support, one who furnishes her with necessary supplies may compel the husband by an action at law to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency. Reynolds v. Sweetser, supra; Hall v. Weir, 1 Allen (Mass.) 261; Camerlin v. Palmer Co., 10 Allen (Mass.) 539. But a minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account even for necessaries. Weeks v. Merrow, 40 Me. 151; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118. Otherwise a child, impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint. White v. Henry, 24 Me. 533. Moreover in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved but will be presumed in favor of the father who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere. Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233. "And this rule results from the legal obligation imposed upon him to provide for her support and education which gives him the right to the profits of her labor." Blanchard v. Ilsley, 120 Mass. 489, 21 Am. Rep. 535; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Emery v. Gowen, supra; Furman v. Van Sise, 56 N. Y. 435, 444, 15 Am. Rep. 441.

So also in that large class of cases wherein needed supplies, furnished by the town to minor children between whom and their father, though they lived apart, the parental and filial relations still subsisted, are considered in law supplies indirectly furnished the father—the reason is because he was bound in law to support them. Garland v. Dover, 19 Me. 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held except under the pauper laws of those states which are substantially like our own. Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Gordon v. Potter, 17 Vt. 348.

But as before seen the law was settled otherwise in this state before the separation and has been frequently recognized in both states since; and we deem it the more consistent and humane doctrine.

It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them. Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; 2 Kent's Com. *192; Weeks v. Merrow, 40 Me. 151; Gray v. Durland, 50 Barb. (N. Y.) 100; Furman v. Van Sise, supra, both opinions; Rev. St. c. 59, § 24.

This leads to an inquiry into the effect of the divorce a vinculo alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made then the father would have no right, either to take them into his custody and support them or employ any one else to do so, without the consent of the mother. Hancock v. Merrick, 10 Cush. (Mass.) 41; Brow v. Brightman, 136 Mass. 187; Finch v. Finch, 22 Conn. 410. Although it is held otherwise in some jurisdictions. Holt v. Holt, 42 Ark. 495, and other cases on plaintiff's brief.

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them. He may, on hab. corp., obtain custody as against their mother, on satisfying the court that he is a fit custodian. Com. v. Briggs, 16 Pick. (Mass.) 203.

It would seem to follow that the divorce alone, while it dissolved the matrimonial relation between the parties thereto, did not affect in anywise the parental relation between them and their children. When the divorce was decreed in behalf of his wife the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that in case of a decree for custody, the father is not holden, impliedly hold that in the absence of any such decree, he is liable. Brow v. Brightman, supra.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued. Carlton v. Carlton, 72 Me. 115, 39 Am. Rep. 307; Webster v. Webster, 58 Me. 139, 4 Am. Rep. 253.

We are of opinion therefore that this action is maintainable on the implied promise of the defendant resulting from the circumstances and the law applicable thereto.

Exceptions overruled.[4]

Peters, C. J., and Walton, Libbey, Emery, and Haskell, JJ., concurred.

STANTON v. WILLSON et al. (two cases).

(Supreme Court of Errors of Connecticut, 1898. 3 Day, 37, 3 Am. Dec. 255.)

These were actions of book debt for education and support, furnished by the plaintiff, before her intermarriage with Stanton, and by him afterwards, to the children of Bird. As both the cases depend upon the same principles, and were argued together, it is not necessary further to distinguish them.

The account produced at the trial consisted of the following articles:

To cash paid Mr. Conklin for his wife's nursing William, an infant son of said John Bird, from June 1st, 1797, to April 1st, 1798, 43 weeks and three days, at 1 dollar	$ 43 43
To paid for extra nursing in his sickness	5
To paid the doctor's bill for ditto	10
To clothing said William 10 months	20
To boarding, clothing and nursing said William from March, 1798, to September, 1803, 6½ years	429 00
To schooling said William 2½ years at 6 dollars	15 00
To nursing and clothing William and his sister Maria, from June 1st, 1797, to May 15th, 1798, 49 weeks and 6 days	74 78
To extra nursing and doctor's bill in her last sickness	20 00
To boarding and clothing said William from October, 1803, to February, 1806, 117 weeks and 1 day, at two dollars 50 cents	292 87
To two and a half years' schooling said William	12 00
To boarding John Herman Bird, son of said John Bird, from February, 1805, to February, 1806, 48 weeks and 1 day	96 30
To paid for classic books, and tuition at college for the same	55 00
To expense money furnished the same	20 00

In the course of the trial, it appeared, that the plaintiff was married to Bird in October, 1789, and continued to be his lawful wife until May, 1797, when she was divorced by a decree of the general assembly. By that decree, she was constituted sole guardian of their youngest children, William and Maria, mentioned in the account, until they should respectively attain to the age of twenty-one years, which guardianship she accepted. Bird was ordered to pay her, within six months from the 1st of June, 1797, three thousand dollars, as her part and portion of his estate, and in lieu of all claims of dower.

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[4] Accord: Finn v. Adams, 138 Mich. 258, 101 N. W. 533 (1904).

This sum was afterwards paid to her satisfaction; and she gave him a written discharge from all claims and demands which she had against him, by virtue of the decree. William and Maria lived with, and under the care of the plaintiff; and their support and education charged in the account were furnished by her, until her intermarriage with Stanton, in October, 1803, and by him afterwards. Of John Herman, the elder son of Bird and the plaintiff, she was not appointed guardian. He continued with his father several years after the divorce, and then, as the plaintiff contended, and introduced some evidence to prove, eloped from him for fear of personal violence, and went to live with Stanton. After this, Stanton furnished him with the support, tuition, books and money charged in the account. It was agreed, that the whole of the charges accrued without any request from Bird, and that he had never made any express promise to pay them.

The plaintiff offered herself as a witness in support of the charges. She was objected to, as incompetent to testify as to such as accrued after her intermarriage with Stanton, on the ground of her relation to him. This objection was overruled, and she admitted.

On the merits, the defendants contended, that Bird was not liable to pay Stanton for any part of the account for supporting William and Maria, on the ground that Stanton was not their guardian; and that, if there was any liability, it accrued to Stanton and his wife jointly. But the court decided, and gave it in charge to the jury, that the sole guardianship of the mother was no objection to a recovery by Stanton, inasmuch as the debt accrued solely to him.

The defendants also contended, that the plaintiff could not recover for any part of the charges relating to John Herman; but the court decided, and gave it in charge to the jury, that if they found that he eloped from his father for fear of personal violence and abuse, and could not with safety live with him, the plaintiff was entitled to recover such sum for his support and education as they should judge reasonable.

The defendants further contended, that upon the facts stated, the action of book debt would not lie; but the court decided, and gave it in charge to the jury, that the action of book debt was the proper remedy.

The defendants further contended, that by force of the decree of the general assembly, and the discharge of the plaintiff, Bird was not bound by law to support the children; but the court decided, and gave it in charge to the jury, that he was solely liable for their support.

On the whole case, the court directed the jury to find for the plaintiff to recover of the defendants such part of the account as was just and reasonable, taking into their consideration the situation and circumstances of the respective parties.

The jury found for the plaintiff accordingly; and the defendants moved for a new trial, on the ground that the court mistook the law in admitting the testimony objected to, and in their charge to the jury.

By THE COURT (SMITH and BALDWIN, Judges, dissenting; SWIFT, Judge, absent). Parents are bound by law to maintain, protect, and educate their legitimate children, during their infancy, or nonage. This duty rests on the father; and it is reasonable it should be so, as the personal estate of the wife, and in her possession at the time of the marriage, becomes the property of the husband, and instantly vests in him.

By the divorce, the relation of husband and wife was destroyed; but not the relation between Bird and his children. His duty and liability, as to them, remained the same, except so far forth as he was incapacitated, or discharged, by the terms of the decree. This decree takes from him the guardianship of two of his children; and with it the right, which, as natural guardian, he might otherwise have exercised; and releases him from those duties only which a guardian, as such, is bound to perform.[5] This transfer of the guardianship to the plaintiff vested her with powers similar to those of guardians, in other cases; and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subjected by a like appointment. By accepting the trust, she became bound to provide for, protect, and educate them, at the expense of Bird, unless the decree of the general assembly has made other adequate provision, which, by the terms of that decree, she is bound to apply. This is not the case here. The sum allowed was directed to be paid to her as her part and portion of Bird's estate, and in lieu of all claims of dower.

Articles furnished by a guardian for the necessary support, maintenance and education of his ward, or by others at his request, are proper articles to be charged on book. Book debt is the proper action; and the party is, by statute, in this action, made a competent witness.

What articles are to be considered as necessaries must depend, in some measure, on the circumstances of the party for whom they are furnished. The court can only instruct the jury as to the classes of articles, which, by law, are considered as necessaries; but the quantity, or extent to which they have been furnished is a fact to be left to the jury; and to what amount they shall be allowed must depend on their discretion.

It may be generally true, that minors under the government of parents, cannot bind their parents for necessaries without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes a sufficient reason for the rule; but neither the rule, nor the reasoning, will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself, or at her request; who, in virtue of her trust, had full power to contract, and make the father liable for necessaries, not only without but against his consent.

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[5] In Keller v. St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391 (1899), it was held that a mother could not recover for tortious damages to her child by a third party, though she had been awarded the custody of the child in a decree for divorce obtained against her husband. Semble, that the right to the child's services and to sue for damages to the parent's right in the child remained in the father.

With respect to the charges on account of Herman's support, if it is admitted, that "he eloped from his father for fear of personal violence and abuse, and could not with safety live with him," every reason for the rule that can be given, ceased to operate. Protection and obedience are relative duties; and when the wisdom that should guide the infant is lost in delirium, and the arm that should protect, and the hand that should feed him, is lifted for his destruction, obedience is no longer a duty, and the child cannot without any propriety be said to be under the government of a father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety where it can be found; and where, with more propriety can it apply, than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say, it was furnished without his consent, or against his will.

Motion denied.[6]

BROWN v. SMITH.

(Supreme Court of Rhode Island, 1895. 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680.)

Assumpsit. Certified from the Common Pleas Division, on an agreed statement of facts.

TILLINGHAST, J. The agreed statement of facts in this case shows that Rebecca M. Brown, the real plaintiff, was formerly the wife of Daniel Bosworth, late of Warren, deceased, and by him had three children; that prior to the death of said Bosworth, Mrs. Brown, then

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[6] Accord: Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542 (1887); Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901); Shields v. O'Reilly, 68 Conn. 256, 36 Atl. 49 (1896); Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678 (1907); Gibson v. Gibson, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587 (1898); Cooper v. McNamara, 92 Iowa, 243, 60 N. W. 522 (1894). But see Finch v. Finch, 22 Conn. 411 (1853), which appears in conflict with the principal case and the later case of Shields v. O'Reilly, supra.

Mrs. Bosworth, upon her petition to the Supreme Court of this State, was divorced from said Daniel Bosworth, and the custody of the said three children of the marriage, they being minors, was awarded to her; that upon the death of said Daniel Bosworth, which occurred about three years after the divorce, the defendant was appointed administrator on his estate, and that after said appointment Mrs. Brown presented to him a claim for the board of said children against the estate of Daniel Bosworth; that said administrator represented said estate insolvent, and thereupon, pursuant to law, commissioners were duly appointed to receive and examine the claims against said estate, and that said commissioners allowed the claim of Mrs. Brown for the board of said children; that upon the filing of the report of said commissioners in the Court of Probate, the administrator, being dissatisfied with the allowance of said claim by the commissioners, gave notice thereof in the office of the clerk of the Court of Probate, and also to the plaintiffs, as provided by law, whereupon said claim was stricken out of said report by the Court of Probate; and that the plaintiffs thereupon, in accordance with the provisions of Pub. St. R. I. c. 186, § 15, brought this suit to determine the validity of the claim of Mrs. Brown against said estate.

The only question presented for our decision, under this state of facts, is: Can a married woman, who has been granted a divorce and the custody of minor children, maintain an action at law against the estate of her deceased husband for the board of said children? We think this question must be answered in the negative.

At the time when said divorce was granted, the Supreme Court had the authority, under Pub. St. R. I. c. 167, § 23, as the Appellate Division now has (Judiciary Act, c. 2, § 4), to regulate the custody and provide for the education, maintenance and support of the children of all persons by them divorced; to make all necessary orders and decrees concerning the same, and the same at any time to alter, amend or annul for sufficient cause after notice to the parties interested therein. Sammis v. Medbury, 14 R. I. 214. This statute is presumably based upon the theory that the rights of the parties in a proceeding for divorce, as to the custody and support of the minor children of the marriage, can be best determined in connection with said proceeding, upon a full consideration of the circumstances and situation of the parties, instead of leaving such rights open to further independent litigation. See Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Chester v. Chester, 17 Mo. App. 657. Whatever is decreed, therefore, regarding the custody of children, in a divorce proceeding, is conclusive of the rights of the parties, until the decree is either modified or annulled. By virtue of the decree in the petition above referred to, said Rebecca M. Brown became entitled to the custody of said minor children, together with the right to their services, and defendant's intestate was thereby deprived of his common law right thereto; and, being thus deprived of this right, he became absolved from the correspondent common law obligation which previously rested upon him to support said children. In other words, the award of the children to the mother carried with it a transfer of parental duties as well as of parental rights. Schouler, Dom. Rel. (3d Ed.) § 237. As said in 2 Bishop, Mar. & Div. § 557: "The true legal principle applicable to cases of this kind seems to be, that the right to the services of the children and the obligation to maintain them go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation." In Burritt v. Burritt, 29 Barb. (N. Y.) 124, the court say: "It would seem almost an oppressive exercise of power, first to withdraw the child wholly from the care, control and influence of the father; to deprive him entirely of its presence, society and aid; to put it entirely in the possession and control of the mother with whom he is at variance; to allow that mother to support, educate and maintain it in her own way and agreeably to her own pleasure, and then to require from the husband an absolute and unquestioning compliance with all her demands for the means of its support, education and maintenance." In short, the right of the father to the services and earnings of his minor children is founded upon the obligation which the law imposes upon him to nurture, support and educate them, and it continues until their maturity, if they remain with him, when the law determines that they are capable of providing for themselves. But when the father is deprived of their custody and services by a decree which commits them to the custody of the mother, the duty to support them no longer exists, except as the court may direct, in pursuance of statutory authority. See Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; Brow v. Brightman, 136 Mass. 187;[7] Johnson v. Onsted, 74 Mich. 437, 42 N. W. 62; Finch v. Finch, 22 Conn. 411; Harris v. Harris, 5 Kan. 46; Hall v. Green, 87 Me. 122, 32 Atl. 796, 47 Am. St. Rep. 311. See also Pub. St. R. I. c. 71, §§ 5, 6.

Counsel for the plaintiffs relies on the case of Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 476, 4 Am. St. Rep. 542, which, while it fully sustains his position, and was rendered by a court whose decisions are entitled to very high respect and consideration, is nevertheless opposed to the preponderance of American authorities upon the question here presented. And, moreover, all the parental obligations of the father so vigorously contended for by the court in that case, could have been enforced in connection with the divorce proceedings. In the States of Arkansas and Illinois there is, or at the time of the rendition of the decisions mentioned below, there was, no statutory provision authorizing the court granting the divorce subsequently to modify its orders and decrees concerning the custody and support of the minor children of the marriage; and therefore the cases of Holt v. Holt, 42 Ark. 495, and Plaster v. Plaster, 53 Ill. 445, can hardly be considered authorities in support of the plaintiff's position. Moreover, the fact, that notwithstanding the very numerous cases of divorce granted in this State in which the custody of minor children has been awarded to the mother, no such action as the present has to our knowledge ever been instituted, indicates very strongly that the members of the bar never supposed that such an action could be maintained. If said Daniel Bosworth were still living, a change in the said decree of divorce, in so far as it relates to the children might for cause shown, upon application of the petitioner therein, be made. But said Bosworth being dead, no such change can now be made; and Mrs. Brown having been, presumably upon her own request, awarded the custody of said children, and no provision having been made in the decree for their support or, so far as appears, even been asked for, she must be presumed to have assumed that duty upon herself, and is now without remedy. Burritt v. Burritt, supra. Again, as no express promise to pay for the board of said children is shown to have been made by defendant's intestate; and as the granting of the custody of said children to the mother negatives any implication of liability therefor on the part of the father, there is no evidence whatever upon which to base judgment in favor of the plaintiffs. Johnson v. Onsted, supra.

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[7] The court in that case said: "If this case depended upon the common-law liability of the defendant, under the facts found by the auditor, the plaintiff would doubtless be entitled to maintain her action."

Judgment for the defendant for costs.[8]

RAMSEY v. RAMSEY.

(Supreme Court of Indiana, 1889. 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682.)

Mitchell, C. J. The judgment from which this appeal is prosecuted was entered against the plaintiff below upon substantially the following facts, which appear in the pleadings: Margaret Ramsey, having been theretofore lawfully joined in marriage with John L. Ramsey, obtained a divorce from him at the March term of the Posey Circuit Court, in 1878. She was pregnant at the time with a child, begotten by her husband in wedlock, which was born shortly after the decree dissolving her marriage with the defendant was pronounced. As a part of the decree the wife was awarded $300 as alimony; but, notwithstanding the fact of her pregnancy was averred in the complaint for divorce, there was no order concerning the future custody or support of the expected child. Living apart from her former husband, and possessed of no means of support except her earnings, the divorced wife assumed the custody, and furnished the necessary support for the child, without any request or promise from the father, who was possessed of sufficient means for its support and education. Having thus supported the child until it was nine years old, she instituted this suit against the father to recover for the maintenance and support of his child.

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[8] Accord: Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425 (1905), under California Code.

In jurisdictions where the rule of the principal case applies, allowance may be made for the child's support when the wife obtains a divorce and is awarded the custody of the child. Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708 (1846); Plaster v. Plaster, 47 Ill. 290 (1868); Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652 (1865); Holt v. Holt, 42 Ark. 495 (1883).

The question is whether, upon the facts stated, a recovery should have been allowed.

The argument in favor of a reversal is predicated upon the proposition "that a father is bound for the necessaries furnished his minor child, and is bound to whomsoever shall keep and maintain his child during the first years of life, when it is helpless to provide for itself." As sustaining this proposition, the following decisions are relied on: Haase v. Roehrscheid, 6 Ind. 66; Wallace v. Ellis, 42 Ind. 582; Kinsey v. State ex rel., 98 Ind. 351.

Two of the cases cited hold in effect, that a father who is guardian of his minor child will not be allowed to assert a claim against the estate of his ward for its support, unless it is affirmatively shown that he was unable to furnish suitable support and education out of his own private means. As a reason for the ruling in those cases it is said that, by the common law, it is made the duty of parents to support their minor children, at least while they are incapable of supporting themselves. The correctness of the rulings in the cases cited cannot be doubted. In the other case nothing more is decided than that a father, who is ready, able and willing to support his minor children at home, cannot be held liable to another, who, without his assent, supports them abroad. This decision affords scant support to the appellant's position. While it is true, beyond any question that the common law enjoins upon parents the duty of protecting, educating, and maintaining their children, it is also true that in the absence of statutes the common law never afforded any means of enforcing this obligation. In the language of Lord Eldon, in Wellesley v. Duke of Beaufort, 2 Russ. 1, 23: "The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father." The duty of the father to protect, educate, and support his tender infant child, for whose being he is responsible, is not only a plain precept of universal law and natural justice, but is enjoined by the positive teachings of the Christian religion. However clear and imperative the duty, or sacred the obligation, of parental support, it is open to serious consideration whether it does not fall within that class of imperfect obligations, or moral duties, the enforcement of which, according to the common law, it was deemed wiser to leave to the impulses of natural affection rather than that it should be committed to unrestrained regulation in the courts. The delicate parental duty which requires of a child submission to reasonable restraint, and demands habits of propriety, obedience, and conformity to domestic discipline, may induce a minor to abandon his father's home rather than submit to what may seem to the parents proper discipline and necessary restraints of the household. It would be intolerable if any one who should choose to furnish a minor necessaries, under all circumstances, could compel the father to answer to a court or jury concerning the propriety of the family discipline. If this were allowed, a child impatient of parental authority might be incited to set at naught all reasonable domestic control by holding over his father's head the alternative of allowing him his way at home, or of paying for his support abroad. Accordingly it has been said no one shall take it "upon him to dictate to a parent what clothing the child shall wear, at what time it shall be purchased, or of whom. All that must be left to the discretion of the father or mother." Bainbridge v. Pickering, 2 W. Bl. 1325.

It is therefore the settled rule of law in England, as well as in this country, that, however derelict a father may have been in the discharge of his parental duty, he is under no legal obligation, in the absence of statutory enactment, to remunerate one who may have furnished necessaries, or afforded relief to his minor child, unless either an express promise to pay, or circumstances from which such a promise may be implied, can be shown. Gotts v. Clark, 78 Ill. 229; McMillen v. Lee, 78 Ill. 443; Freeman v. Robinson, 38 N. J. Law, 383, 20 Am. Rep. 399; Hunt v. Thompson, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; Gordon v. Potter, 17 Vt. 348; Varney v. Young, 11 Vt. 258; French v. Benton, 44 N. H. 28; Townsend v. Burnham, 33 N. H. 270; Raymond v. Loyl, 10 Barb. (N. Y.) 483; Blackburn v. Mackey, 1 Car. & P. 1. See Schouler, Dom. Rel. § 241, and notes, and Tyler, Inf. sections 190, 191.

Thus, in Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499, where a father had been guilty of a palpable omission of duty in turning his son adrift upon the world, with little education or ability to take care of himself it was held in an elaborate opinion in which the authorities were fully reviewed, that the father was not liable to one who had furnished him with necessaries, in the absence of a contract, express or implied. In that case the court deduced the conclusion, "That a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon a promise to pay for them; and that such promise is not to be implied from mere moral obligation. * * * But the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law." The further conclusion was deduced, that it would be a question for the jury in each case, taking into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of the child, whether or not the facts were sufficient to warrant the finding of a promise, express or implied. Quoting from Chitty, this court said, in Hollingsworth v. Swedenborg, 49 Ind. 378: "Though independently of an express contract, or one implied from particular facts, a father cannot be sued for the price of necessaries provided for his infant son, yet very slight circumstances will justify a jury in finding a contract on his part." So in Shelton v. Springett, 20 Eng. Law & Eq. 281, it was held that a father is not liable on a contract made by his minor child, even for necessaries furnished, unless an actual authority be proved, or the circumstances be sufficient to imply one.

In Mortimere v. Wright, 6 M. & W. 482, Lord Abinger, C. B., declared that, "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother or an uncle or a mere stranger would be," and he said further, that "the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts." On the other hand, it has sometimes been said, where a parent fails to discharge the natural obligation resting upon him, by neglecting to provide necessaries for his infant children, that any other person who supplies them will be deemed to have conferred a benefit upon the delinquent parent, for which the law raises an implied promise on his part to make compensation. Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Reynolds v. Sweetser, 15 Gray (Mass.) 78.

While we should hesitate to declare that a father is not in any sense under a legal, as well as a moral, obligation, to nurture and maintain his minor child during the tender years of infancy and helplessness, we do give full recognition to the rule which lies at the foundation of all the cases, that the right of a third person to recover, who has discharged the obligation of the father, and supplied his offspring with necessaries which he neglected to furnish, must, in every instance, be predicated upon a contract express or implied. White v. Mann, 110 Ind. 74, 10 N. E. 629; Horn v. Eberhart, 17 Ind. 118; Wiggins v. Keizer, 6 Ind. 252; Schouler Dom. Rel. § 241.

It would be futile, as well as hurtful, to attempt, by any general statement, to lay down a rule, or otherwise describe the circumstances, under which the law would imply a promise on the part of a father to pay for necessaries supplied by another to his minor child. Surely it would be safe, on the one hand, to say, if a father should purposely abandon his child, or cast it out helpless upon the world, under such circumstances that but for the intervention of another the life or health of the infant would be imperiled, the parent would not be heard to say that he did not come under an implied obligation to pay for doing that which it was his duty to do. On the other hand, if a minor child, who had reached years of discretion, should abandon the paternal roof, even though it were with the consent of his parents, in order to escape domestic discipline or parental restraint, it could not reasonably be inferred that he carried with him by legal implication the right to pledge his father's credit for support. Weeks v. Merrow, 40 Me. 151; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118.

Slight evidence may sometimes warrant the inference that a contract for the infant's necessaries is sanctioned by the father, and the evidence of a contract may grow out of an infinite variety of circumstances.

A relation, which the law recognizes as contractual, may arise between parties in three ways: (1) The terms of the agreement may have been uttered, avowed, or expressed, at the time it was made; in which case an express contract results. (2) Circumstances may have arisen, or acts may have been done which, according to the dictates of reason and justice and the ordinary course of dealing, or the common understanding of men, show a mutual intention to contract; in which case an implied contract arises. (3) There may have been no intention to contract at all, and yet one may have come under a legal duty to another of such a character that the law precludes him from asserting that he did not agree to perform it, and thus, by a fiction of law, a contract results by construction, or implication. Hertzog v. Hertzog, 29 Pa. 465.

Implied or constructive contracts of this latter class, are similar to the constructive trusts of courts of equity. They arise out of a state of facts from which the law alone, contrary to the intention of the parties, produces the obligation by compulsion, or "by force of natural equity." People v. Speir, 77 N. Y. 144–151; Wright v. Moody, 116 Ind. 175, 18 N. E. 608; Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347; Add. Cont. 23; 3 Am. & Eng. Encyc. of Law, 860.

It is, of course, plain enough that there was no express contract, in the present case, to pay for the support of the child. It seems equally plain, from all the circumstances, that there was no mutual intention on the part of the father and mother that the latter should be compensated for the support of the child. When the marital relation was dissolved the mother, by the decree of nature, was the necessary custodian of the child, and it was then certain that she must remain its custodian until it should arrive at an age when maternal care was no longer indispensable. Possibly if she had offered then, or at any subsequent time, to surrender the child to the custody of the father, and he had refused to accept it, the law might have implied a promise to pay for its future support. The mother chose, however, to indulge the better instincts of her nature, and keep her child. While she retains the custody and society of her child, unless she does so in consequence of the refusal of the father, the law will not imply a mutual intention to make or receive compensation for its support.

The right to the custody and services of the child, and the obligation to support and educate, are reciprocal rights and obligations, unless otherwise fixed by judicial decree. Husband v. Husband, 67 Ind.

583, 33 Am. Rep. 107; Johnson v. Onsted, 74 Mich. 437, 42 N. W. 62; Schouler, Dom. Rel. § 237; 2 Bishop, Mar. & Div. § 557.

It does not appear that the husband was absent from the state, or neighborhood in which the mother and child lived, or that he refused, or would have been permitted voluntarily to take the custody and support of the child. All that appears is that the mother voluntarily retained the custody and maintained and supported it without let or hindrance, and without any request from the father. Where a parent supports a child, or a child a parent, the law refers the motive which induced the support to the relationship and affection consequent thereon, and will not imply a promise to pay, or infer a mutual intention to make or receive compensation. Wright v. McLarinan, 92 Ind. 103; Davis v. Davis, 85 Ind. 157; Fitler v. Fitler, 33 Pa. 50; Fross' Appeal, 105 Pa. 258.

Services which are intended to be gratuitous at the time they are rendered cannot afterwards be used as the basis of an implied promise to pay for them. Potter v. Carpenter, 76 N. Y. 157; St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86.

Ordinarily, where a wife with an infant child, is driven from the husband's house by his cruelty or misconduct, she may pledge his credit for the child's necessaries as well as her own while he permits it to remain with her, but she can exercise no such agency after she is divorced. Schouler, Dom. Rel. 345.

After a decree of divorce, either with or without an order for the custody of the children, there is no implied obligation on the part of the father to pay for support voluntarily furnished by the mother to the children while she asserts and maintains the right to their custody and society, unless the father has in some way manifested his purpose to abandon them, or has refused to take them into his custody and render them proper support. Hancock v. Merrick, 10 Cush. (Mass.) 41.

After a wife is divorced she occupies the same relation to her husband in respect to her common-law right to recover for necessaries furnished his children as any other stranger. Her right to recover must rest upon a contract, express or implied. The facts in the present case fall far short of showing an implied contract. Nor do the facts make the present a case in which a contract by construction or compulsion of law arises. The child having necessarily come into the custody of the mother, after the dissolution of the marital relation, it cannot be charged against the father as a wrong that he did not assert the right to separate it from its mother, as possibly he might have done. That he allowed it to remain with her cannot be regarded as an abandonment of the child. As was pertinently said in Fitler v. Fitler, supra: "When a man abandons his child and casts it upon the public, he becomes liable for its support. But it is entirely impossible to treat a child as thus cast upon the public, when the fact simply is, that the mother has deserted the father, and carried away the child and continues to support it. This is merely leaving it with her, until she chooses to restore it; and while she keeps it on such ground she has no claim for compensation."

It is true, in the case cited the wife was in the wrong, she having, while pregnant, deserted her husband, who afterward obtained a divorce. But the right of the wife to recover was denied, upon the ground that the husband had been guilty of no wrong to the child in leaving it with the mother in deference to her feelings, and that hence, no contract could be inferred. Accordingly we rest our conclusion here upon the fact that the child, so far as appears, was allowed to remain with its mother out of regard for her feelings, and not in pursuance of any purpose to neglect or abandon it.

The case of Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307, has fallen under our observation. In that case a father had deserted his wife and children and left the state, and it was held in a contest between the wife and the creditors of the husband, after a decree of divorce for desertion and want of support, no decree for custody or alimony having been made, that the mother might maintain an action against the father for the necessary support of their minor children. But the decision in that case went upon the distinct theory that the father had deserted and discarded his minor children, and in that view it is in consonance with our conclusion here. As we have seen, nothing of that kind appears in the present case, and it follows, from what has preceded, that the plaintiff had no common-law right to recover upon the facts stated. Our conclusion is not at all affected by the contention that the right to recover for the support of the child was adjudicated in the proceeding for divorce. That adjudication settled the rights of the parties as they existed at the time, but it did not affect their rights so far as the future custody or support of the unborn child was concerned. Whatever relief the mother may be entitled to, if any, growing out of the changed circumstances since the rendition of the decree, must be sought by an application to the court for a modification of the decree in reference to the support and custody of the child. Dubois v. Johnson, 96 Ind. 6; 5 Am. & Eng. Encyc. of Law, 837. There was no error.

The judgment is affirmed, with costs.[9]

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[9] Accord: Kelly v. Davis, 49 N. H. 187, 6 Am. Rep. 499 (1870).

A fortiori, a parent is not liable when it appears affirmatively that the child was wrongfully taken from one parent, who was the lawful custodian, by the other parent. Baldwin v. Foster, 138 Mass. 449 (1885); Foss v. Hartwell, 168 Mass. 66, 46 N. E. 411, 37 L. R. A. 589, 60 Am. St. Rep. 366 (1897); Glynn v. Glynn, 94 Me. 465, 48 Atl. 105 (1901); State v. Philips, 1 Pennewill (Del.) 11, 39 Atl. 453 (1897); Hyde v. Leisenring, 107 Mich. 490, 65 N. W. 536 (1895); Schnuckle v. Bierman, 89 Ill. 454 (1878).

Contra: Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820 (1898). See, also, Rankin v. Rankin, 83 Mo. App. 335 (1900); Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942 (1894).

In the same way, the parent is not liable where it appears affirmatively that the child wrongfully left the custody of his parent of his own accord. Weeks v. Merrow, 40 Me. 151 (1855); Glynn v. Glynn, 94 Me. 465, 48 Atl.

HUKE v. HUKE.

(St. Louis Court of Appeals of Missouri, 1891. 44 Mo. App. 308.)

THOMPSON, J. This action is brought by a daughter, seventeen years of age, by her next friend, against her father for support and maintenance. The circuit court sustained a demurrer to the petition, and the plaintiff prosecutes this appeal. The petition is as follows:

"Your petitioner, Frieda Huke, by Thomas P. Bashaw, her next friend herein appointed, respectfully represents and shows: That petitioner is a resident of the city of St. Louis, state of Missouri, aged seventeen years, and the daughter of defendant, William Huke, by Amelia Huke, his wife, who died in said city of St. Louis on the thirteenth day of November, 1888; that continuously from her birth, until the date hereinafter mentioned, petitioner resided with and remained under the guardianship and control of her father, said William Huke, and dependent upon him for her support, for necessaries and for mental and moral training and education; that, on or about the first day of July, 1890, petitioner's father, said William Huke, forcibly by commands, threats and duress, compelled petitioner to depart from and to leave his house and home without money or means or provision for her subsistence, and has continuously since failed, neglected and refused to resume exercise or perform any of his duties as her parent and natural and legal guardian, and has utterly and wholly renounced and abandoned all his said duties, and has failed, neglected and refused to make provision, or to supply any money or means, for petitioner's care, custody and guardianship, for her support, for her necessaries, or for her mental and moral training and education; that for many years last past defendant, William Huke, has been, and still is, the owner of a large amount of property, and engaged in prosecuting an extensive and profitable business in said city of St. Louis, and possessed of a large income, and is well able financially to make provision for petitioner's needs in the premises; that petitioner is wholly destitute, has no funds, property or resources of any kind; that, by reason of her youth, sex and lack of education and experience, she has been and is unable to secure employment or to earn the means of subsistence; that she is without a home, and that she has no abiding place, food or raiment, save such as are bestowed upon her in friendship and charity; that she is without means or provision, or hope of obtaining same, for the furtherance of her mental and moral training and education; that, for her relief, she has incurred debts and obligations beyond her capacity to pay, and her credit is now exhausted; that the petitioner is wholly without hope or prospect of relief, and without remedy at law, or any remedy whatsoever, save through the intervention of this honorable court in enforcing against

105 (1901); Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098 (1906).

her father, said William Huke, petitioner's right to a just, adequate and suitable provision for her wants in the premises. Wherefore, petitioner, by Thomas P. Bashaw, her next friend aforesaid, prays this honorable court to grant herein its order and command to said William Huke, requiring and directing him to appear before this court at a time in said order to be stated, then and there to show cause, if any there be, why he should not be ordered, directed and required by this honorable court to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority, and for her necessary cost and expenses herein, and further to show cause, why this honorable court should not appoint in that behalf a suitable person to act under the orders and direction of the court as petitioner's acting guardian in the premises; and petitioner further prays the court, through Thomas P. Bashaw, her next friend aforesaid, that upon the return to said order, and upon the final hearing hereof, this honorable court may by order and decree herein order, direct and require said William Huke to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority for her support, for necessaries, mental and moral training and education, for her costs and expenses herein, and that this honorable court may, for the accomplishment of such purposes, nominate and appoint a suitable person to act pendente lite, and until petitioner attains her majority, under the orders and direction of this honorable court, in receiving such funds and means from said William Huke, and applying same for the purposes aforesaid for the benefit of petitioner, and for such other and further relief as may seem meet and proper and within the powers of this honorable court."

This action proceeds in the face of elementary principles. By the common law of England a father is not bound to support his infant child in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable, as upon an implied contract, to a stranger who furnishes necessaries for the support of his infant child. Urmston v. Newcomen, 4 Ad. & El. 899; Mortimore v. Wright, 6 Mees. & W. 482; Seaborne v. Maddy, 9 Car. & P. 497; Hodges v. Hodges, Peake, Ad. Cas. 79. On this point many of the American courts follow the English rule, but some of them have departed from it and adopted the more humane principle, that the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessaries furnished to a child by a stranger. See, for instance, Gotts v. Clark, 78 Ill. 229; Hunt v. Thompson, 3 Scam. (Ill.) 179, 36 Am. Dec. 588. I have looked through our Missouri cases without satisfying myself what the state of our law is on this question of the father's liability for necessaries. But the intimations of those cases are such that w may concede that, under our law, a father is liable to a stranger for necessaries furnished to his infant child. Rogers v. Turner, 59 Mo. 116; St. Ferdinand Academy v. Bobb, 52 Mo. 357; Girls' Home v. Fritchey, 10 Mo. App. 344. And yet it does not follow that such an action as the present will lie.

No instance is found in the books, where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 Wm. III, c. 4. The very enactment of this statute,—the necessity in the state of the law for such a statute,—shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. Inhabitants of St. Andrews Parish v. Mendzes de Breta, 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the lord chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, c. 30; 1 Bla. Com. 449.

But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the chancellor of England had, in virtue of a delegated authority from the king as parens patriæ, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the king as parens patriæ. But the extent to which the court has gone in the exercise of this power has been to make orders disposing of the custody of infant children, and directing a scheme of education out of their own property, when they had property out of which such a scheme could be directed. At one time there was considerable opinion to the effect, that the jurisdiction of chancery in this regard rested upon property; and, therefore, it was a common practice for some relative of a child, desiring to obtain an order of chancery, taking the child away from the father for misconduct of the latter, to settle upon the child a certain amount of property. But it was finally settled that the jurisdiction did not rest on property (In re Spence, 2 Phil. 247; In re Fynn, 2 De Gex & Sm. 457, 481); though the chancellors often refused to exercise it in cases where the infant had no property, because, without the aid of property, it could not be conveniently and beneficially exercised. In re Fynn, supra.

In the exercise of that jurisdiction it will appear that the English court of chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries—in France and America, and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England—a jurisdiction which, it may be assumed, no American court would dare to exercise. But, while thus attempting a tyrannical and extra-territorial jurisdiction against parents, no court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced. If distressing circumstances to the contrary sometimes arise, the most that can be said is that they illustrate a profound defect in the common law. The court cannot remedy this defect, for the courts have no legislative power. Arguments, addressed to us upon the reason and humanity of the rule which would sustain this action, are vain. They are addressed to a tribunal which has no jurisdiction to change the law of the land.

We have been referred to the case of Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708, in which the court sustained an action by a divorced wife against her husband for the maintenance of the children of the marriage. Without reference to the ground on which the relief was put, it is sufficient to say that it is no authority for the present action. The action was brought by a wife, who had been divorced against her late husband, and it may be assumed that the court still possessed jurisdiction over the subject of alimony and maintenance. But, whatever may be said of the ground on which that case proceeded, we are obliged to say that a single decision cannot change a rule of the common law which has been settled for ages.

The view which we take of this petition renders it unnecessary to consider whether, in view of the jurisdiction over the guardianship of minors, which our statutes have vested in the courts of probate, such a jurisdiction as is here invoked could be held to exist in the circuit courts in any event.

The judgment will be affirmed. All the judges concur.[10]

[10] Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901), which seems contra, may go upon the fact that under the Nebraska Code there is no procedural difficulty with enforcing any legal right to support which may exist.

NOTE ON OBLIGATION OF CHILD TO SUPPORT PARENT.—Apparently no legal obligation in the absence of statute rests upon the child to support its parent. Edwards v. Davis, 16 Johns. (N. Y.) 281 (1819); Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613 (1908).

Statutory provisions requiring members of a family, whether children or

CHAPTER III

PARENT'S RIGHT TO EARNINGS AND SERVICES OF CHILD[1] AND TO AN ACTION FOR DAMAGE TO PARENT'S RIGHT IN THE CHILD—EMANCIPATION

SECTION 1.—PARENT'S RIGHT TO EARNINGS OF CHILD

DONK BROS. COAL & COKE CO. v. RETZLOFF.

(Supreme Court of Illinois, 1907. 229 Ill. 194, 82 N. E. 214.)

Appellee, the plaintiff below, while engaged as a driver in the appellant's (the defendant's) mine was injured in attempting to couple cars, and brought this suit to recover damages for said injury. Appellee recovered a verdict and judgment in the circuit court of Madison county for $2,000. This judgment was affirmed by the Appellate Court for the Fourth District and from that judgment appellant has appealed to this court.

FARMER, J.[2] * * * Appellee was 19 years old at the time of his injury. He testified he had been working in mines about 5 years.

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parents, who are disabled or incompetent to earn a living to be supported by other members of a family are numerous. Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083 (1907); In re Sparr's Case, 22 Pa. Co. Ct. R. 406 (1899); Commonwealth v. Spaar, 8 Pa. Dist. R. 380 (1899); Johnson County v. Stratton, 111 Iowa, 421, 82 N. W. 955 (1900); Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838, 4 L. R. A. (N. S.) 1159, 117 Am. St. Rep. 125 (1906); Condon v. Pomeroy-Grace, 73 Conn. 607, 48 Atl. 756, 53 L. R. A. 696 (1901). Observe also that there are penal statutes punishing the non-support of children by parents: See 1 Stimson's Statutes, § 6608; also State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985 (1901); State v. Teal, 77 Ohio St. 77, 83 N. E. 304 (1907); People v. Joyce, 189 N. Y. 518, 81 N. E. 1171 (1907); Commonwealth v. Acker, 197 Mass. 91, 83 N. E. 312, 125 Am. St. Rep. 328 (1908).

[1] The child is entitled to property other than earnings coming to it in the usual way. Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105 (1858).

A question sometimes arises as to what are earnings and what are not. It has been generally held that a sum paid to a minor as a bounty to induce him to enlist in the military service of the United States was not a payment for services and so could not be classed as earnings. Banks v. Conant, 14 Allen (Mass.) 497 (1867); Taylor v. Mechanics' Savings Bank, 97 Mass. 345 (1867); Magee v. Magee, 65 Ill. 255 (1872); Holt v. Holt, 59 Me. 464 (1871); Mears v. Bickford, 55 Me. 528 (1867); Baker v. Baker, 41 Vt. 55 (1868); Brown v. Canton, 4 Lans. (N. Y.) 409 (1871); Halliday v. Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653 (1887); Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579 (1895).

[2] Statement condensed from opinion, and part of opinion relating to another point omitted.

His first employment was in carrying dull picks to the blacksmith and sharp ones to the miners. He was engaged in this manner about 1 year, and then began loading coal with an older brother as his buddy. After working in that capacity for about 2 years he worked a few months on a railroad, and then went to loading coal in a mine at Glen Carbon with his father as his buddy. Appellee testified that after having been thus engaged for about a year his brother-in-law, in whose name the suit was brought as next friend, secured him a job in appellant's mine. The brother-in-law worked in the same mine and appellee lived at his house while engaged there. In the first instruction given for appellee the court told the jury, if they found in his favor, in assessing his damages they should take into consideration his loss of time. It is not denied that unless he had been emancipated appellee's services belonged to his father, in whom a right of action existed to recover for their loss, but it is contended the proof justified the inference that appellee had been emancipated by his father. While it is true, proof of an express agreement of the father relinquishing his claim upon the services of a minor son is not necessary, but such relinquishment may be inferred from circumstances, there must be something in the circumstances proven from which an intention on the part of the parent to relinquish his right to the earnings of his minor child fairly appears. There is nothing in the testimony in this case showing to whom the wages of appellee had been paid, nor any other circumstance that would justify the assumption that his father had relinquished his right to the value of his services. This case is unlike Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583, and American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784. In those cases the suit was in the name of the father, as next friend of the minor.

Some general objections are made to other instructions given for appellee, but no valid reasons are given why they were erroneous.

For the error indicated the judgments of the appellate and circuit courts are reversed and the cause remanded.

Reversed and remanded.[3]

OSBORN v. ALLEN.

(Supreme Court of New Jersey, 1857. 26 N. J. Law, 388.)

The Chief Justice [Honorable Henry W. Green].[4] This action was commenced in the court for the trial of small causes, by Rebecca Cottrell, against Osborn, the plaintiff in error, to recover compensation for the work and labor of her son, an infant, done and performed for the defendant below, and at his request. On the trial of the appeal before the Middlesex Pleas, a motion made to non-suit the plaintiff was denied by the court. The judgment of the Common Pleas, having been removed by certiorari to the Middlesex Circuit, was there affirmed. A reversal is now asked, on the ground that the Court of Common Pleas erred in refusing to non-suit.

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[3] Accord: Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334 (1905); Western Union Tel. Co. v. Woods, 88 Ill. App. 375 (1899).

[4] Part of the opinion is omitted.

* * *

The second reason assigned for error is, that an action cannot be maintained by a mother, the father being dead, for the services of a minor child. It appeared in evidence that the minor was a member of his mother's family; that for ten years the mother had had the sole charge of the family; that the minor worked out from home, his mother receiving his wages, and that his washing and mending were done at home.

What authority, by the laws of this state, has a mother over her minor children? The right is not regulated by statute. It rests upon the principles of the common law, as modified and moulded by our institutions and construed and applied by our judicial tribunals. Blackstone, in a parenthesis consisting of a single line, has disposed of the subject, by stating that a mother, as such, is entitled to no power, but only to reverence and respect. 1 Bla. Com. 453. And this doctrine seems to have been adopted and applied in its fullest extent by some of the American courts. Commonwealth v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412.

A dissent from so high an authority certainly should not be ventured upon without the support of clear principle. But I think it will be found that the proposition is not consistent with the principles of natural law, with the rules of the common law, or with the dictates of sound public policy.

The authority and rights of parents over their children result from their duties. The law of nature acknowledges no other foundation of a parent's right over his children besides his duty toward them. Paley's Mor. Phil., book 3, ch. 10. The authority is given them partly to enable the parent to perform his duty, partly as a recompense for his care and trouble in the faithful discharge of it. 1 Bla. Com. 452.

The duties of parents to their children, by the law of nature, rest equally upon both. It is the duty alike of each parent to maintain, protect and educate their children. Puffendorf's Laws of N., book 4, ch. 11; Paley's Mor. Phil., book 3, ch. 9; 1 Bla. Com. 446.

If, then, the rights of parents result from their duties, their duties being the same, their rights must be the same also. While the father is living, the authority of the mother, for obvious reasons, is in abeyance. As the mother herself (says Dr. Paley) owes obedience to the father, her authority must submit to his. In a competition, therefore, of commands, the father is to be obeyed. In case of the death of either, the authority, as well as duty of both parents, devolves upon the survivor. Mor. Phil., book 3, ch. 10.

The extent of this natural authority of parents over children is the subject of municipal regulation, and has greatly varied in different ages and under different systems of laws. It has undoubtedly been greatly modified by the progress of intelligence and refinement, by the diffusion of the benign principles of Christianity, and the consequent elevation of the female sex. The ancient Roman laws gave to the father the power of life and death over his children. 1 Bla. Com. 452. The mother had no authority over her children. She could have none, because the Roman laws subjected women, except they were under the cover and authority of a husband, to a perpetual guardianship. Montesquieu's Sp. of Laws, book 7, ch. 12.

The great natural duties of parents to their children, maintenance, protection and education, are all recognized at common law, and to some extent enforced by statute. The duties of protection and education are left by our law to rest simply where the law of nature has placed them. It recognizes the duty as belonging to both parents, and the consequent rights and obligations resulting from them are the same. A mother, as well as the father, may maintain and uphold her children in their lawsuits without being guilty of the legal crime of maintaining quarrels. She may justify an assault and battery in defense of the persons of her children. She may maintain an action for the seduction of her daughter. Coon v. Moffitt, 3 N. J. Law, 583, 4 Am. Dec. 392.

And in the absence of express authority, I think I hazard nothing in saying that by the well-settled law of this state, a mother is not only authorized, but bound, the father being dead, to exercise authority over her children. Upon an indictment against her for keeping a disorderly house, it would be no answer for her to say that her daughters were licentious, and her sons profligate, and that she could not govern them. The law imposes upon her the duty of restraining and governing her children; and to this end it confers upon her the requisite authority. She, as well as the father, may inflict upon her children moderate chastisement. If not, she is indictable for punishing a minor child, however moderate that punishment may be. Such an indictment, it is believed, has never been sustained in this state. In these respects there is no distinction in our law between the authority of the mother and that of the father. It is true that the mother, as such, has during the life of the father no authority. The authority is by the law vested in the father alone; for if they shared the authority there might be conflicting powers. When the mother exercises family discipline, living the father, the law presumes it to be done by his direction and with his consent. Reeve's Dom. Rel., ch. 11. But the father being dead, the right and the duty of government, and the requisite authority for that purpose, devolve upon the mother. Such, we have seen, is the clear principle of natural law, and such we apprehend to be the law of this state: a rule founded not only upon natural law, but resting upon the dictates of public policy, and the true interest of society.

In regard to the maintenance of children, the only obligation expressly imposed by law, that of maintaining poor children not able to work, rests alike upon both parents. Nix. Dig. 614, § 26; 1 Bla. Com. 448.

There is, however, this distinction recognized by the authorities between the obligation of the father and that of the mother to maintain their infant children, viz., that the father is bound to maintain his children during their minority, though the children have ample property for their support, while no such obligation rests upon the mother. And this distinction has been relied on as showing that the mother cannot be entitled to the services of her children. But a satisfactory solution of the distinction may, perhaps, be found in the respective rights of husband and wife in regard to property, and in the distribution of the estate, upon the death of the father, under the rules of the common law.

The control of the mother over the person and services of her infant children is more restricted than that of the father. It cannot be exercised during the life of the father. Her right may be determined by her marriage, or by the appointment of a guardian for his children, either by the will of the father or by authority of law. But, by the law of this state, while she remains unmarried, the mother has a right to the services of a minor child for whom no guardian has been appointed, so long, at least, as the child remains under her protection. Within these limits, the right of the mother to the services of her children is the same as that enjoyed by the father. Such has long been understood to be the well-settled law of this state. It is supported by principle, and sound public policy requires that it should not be disturbed.

The judgment must be affirmed.[5]

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[5] In accord as to the mother's right to succeed to the father's right to a minor child's earnings and services in case of the death or desertion of the father. Clay v. Shirley, 65 N. H. 644, 23 Atl. 521 (1874); Matthewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339 (1870); Simpson v. Buck, 5 Lans. (N. Y.) 337 (1871).

Contra: Pray v. Gorham, 31 Me. 240 (1850); Franz v. Riehl, 5 Pa. Dist. R. 565 (1896); Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. Rep. 687 (1875).

Parent obtains title to what is purchased with child's earnings. Harper v. Utsey (Tex. Civ. App.) 97 S. W. 508 (1906); Smith v. Smith, 112 Ga. 351, 37 S. E. 407 (1900)

So, the payment of his wages by an infant to his parent is no consideration for a transfer of land by the parent to him. Crary v. Hoffman, 115 Iowa, 332, 88 N. W. 833 (1902).

NOTE ON ASSIGNABILITY TO THIRD PARTY OF PARENT'S RIGHT TO SERVICES AND EARNINGS OF CHILD.—The right of the parent to assign by parol to a third party the child's future wages has been recognized. Camerlin v. Palmer Company, 10 Allen (Mass.) 539 (1865); Roby v. Lyndall, Fed. Cas. No. 11,972 (1833); McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (1902); Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593 (1877).

The assignment of the custody and services of the child to a third person is revocable unless it be under seal. State v. Libbey, 44 N. H. 321, 82 Am. Dec. 223 (1862); Mohry v. Hoffman, 86 Pa. 358 (1878).

Under statutes relating to apprentices the attempted assignment under seal

SECTION 2.—ACTION BY PARENT FOR DAMAGE TO PARENT'S RIGHT IN CHILD[6]

SORRELS v. MATTHEWS.

(Supreme Court of Georgia, 1907. 129 Ga. 319, 58 S. E. 819, 13 L. R. A. [N. S.] 357.)

Action for damages. Before Judge Wright. Randolph Superior Court. November 8, 1906.

J. M. Sorrels brought an action against C. R. Matthews, teacher of a public school, for damages in the sum of $300, for expelling the plaintiff's children from the school. The petition was dismissed at the trial term, on a motion in the nature of a general demurrer, and the plaintiff excepted. The substance of the petition was: The defendant contracted with the board of education of Randolph county to teach a public school at Benevolence in that county for six months beginning December 1, 1905. He also agreed with the trustees of the Benevolence Academy "to carry on, in conjunction with said public school, a school in said Benevolence Academy extending two months longer than said public-school term, and in which other branches were taught than those taught in the public school; and under an arrangement of some sort between the trustees or between him and said trustees, it was arranged to pay his salary for this extra time by levying an assessment on every pupil who entered said school, regardless of whether entered for the whole or only the public term, at the rate of from five to seven dollars." The plaintiff had three children of school age, entitled to enter said public school. The school was opened by the defendant in October or November, 1905, and at the beginning of the public term thereof, when the plaintiff had the right to enter his children, he entered them in said public school, notifying the defendant, at the time, that they were being entered for the public department and for the public term only, and for the purpose of receiving such advantages alone as the public school afforded. Soon after the children were thus entered, the chairman of the board of trustees of said academy demanded of plaintiff $16, for the assessment levied by said board of trustees on each pupil. The plain-

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by parents of the custody and services of the child, while binding between the parent and the third party, is revocable by the child unless the terms of the statute have been complied with. State v. Barrett, 45 N. H. 15 (1863); Anderson v. Young, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277 (1898); Emery v. Gowen, 4 Greenl. (Me.) 33, 16 Am. Dec. 233 (1826).

[6] For this subject as a part of the law of torts, see "The Boycott and Kindred Practices as Ground for Damages," by John H. Wigmore, 21 Am. Law Rev. 509–532; also "Interference with Social Relations" by the same author, 21 Am. Law Rev. 764–778.

tiff "declined to pay the same, and the demand was several times afterwards made on [him] by some member of said local board of trustees, which [he] as often refused to pay." The chairman of the board of trustees then notified the plaintiff that unless said sum was paid his children would be sent home. The plaintiff not having paid the amount so illegally exacted, the defendant, about December 13, 1905, "publicly and in the presence of said school, for no other cause or reason than petitioner had refused to yield to said illegal exaction, dismissed, expelled, and sent petitioner's said children home and afterwards refused to receive them or to teach them in said public school, unless he would pay the assessments imposed upon him by the board of trustees of said academy." The defendant, in expelling plaintiff's children, acted with full knowledge that neither the trustees nor he had any right to make such assessments and to refuse to receive them back in school, and "the acts of said Matthews in said matter were arbitrary, willful, and malicious." In order to have his children restored to the school, it was necessary for the plaintiff to mandamus the county board of education, and by this means the children were put back in the school on January 18, 1906. The plaintiff, "by reason of the loss of time from said school by his said children and the expense of having to pay attorney's fees, * * * was injured, and by the wrong and humiliation put upon his unoffending children [he] was humiliated and his feelings greatly wounded. Besides this the action of said Matthews put him in the attitude of one who refused to pay his obligations, and the acts of said Matthews were willfully and maliciously designed to put him in that false light before the public, and by such acts petitioner says that he has been injured and damaged in the sum aforesaid."

Fish, C. J. (after stating the facts). One ground of the motion to dismiss the petition was that it set forth no right of action in the plaintiff. In our opinion, this ground was well taken, and therefore the necessity of dealing with any other question raised by the record is obviated. In no case can a father maintain an action for a wrong done to his minor child, unless the father has incurred some direct pecuniary injury therefrom, in consequence of loss of service, or expense necessarily consequent thereon. Bell v. Wooten, 53 Ga. 684; Central Railroad Co. v. Brinson, 64 Ga. 475; Frazier v. Georgia Railroad Co., 101 Ga. 70, 28 S. E. 684; Hurst v. Goodwin, 114 Ga. 586, 40 S. E. 764, 88 Am. St. Rep. 43. Civ. Code 1895, § 3816, providing that "every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant," is merely declaratory of the common law. Frazier v. Georgia Railroad Co., 101 Ga. 70, 28 S. E. 684. At common law the parent's right to recover for a tort to his minor child is, by legal fiction, predicated upon the relation of master and servant. Frazier v. Georgia Railroad Co., 101 Ga. 70, 28 S. E. 684, and cases cited. In Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53, it was held that "the teacher of a town school is not liable to any action by a parent for refusing to instruct his children." This ruling was put upon the ground that there is no privity of contract between the parent and the teacher, the latter being responsible on his contract only to the town by which he is employed and paid. In Sherman v. Charlestown, 8 Cush. (Mass.) 161, Shaw, C. J., referring to the case just cited, in which he also delivered the opinion, said that the court were of opinion, among other reasons, that the action was misconceived, "because the father is not the person injured and entitled to recover damage in his own right." In Stephenson v. Hall, 14 Barb. (N. Y.) 222, it was held that an action will not lie in behalf of a parent, against the town superintendents of public schools, for expelling and excluding the plaintiff's minor child from the common schools, nor for damages sustained by the parent in bringing an appeal to the state superintendent of common schools, to get such child reinstated in the schools. In the opinion in that case, Allen, J., used this language: "Can it be said that the plaintiff has an interest as well as a right to have his daughter in the school, that by reason of the education she was receiving she was being prepared to render herself more useful, and that her services during her minority would thus become more valuable to her parent? This would be carrying the doctrine much too far, in my opinion, in order to sustain an action of this kind—an action clearly not to be favored, unless in support of an undoubted principle of law." In Donahoe v. Richards, 38 Me. 376, it was held that the parent of a child expelled from a public school by order of the superintending school committee can maintain no action against the members of the committee for such expulsion. In delivering the opinion, Appleton, J., said: "In this case, there is no act done by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her; and if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone—and if her rights have been violated, she alone is entitled to compensation." So, in Boyd v. Blaisdell, 15 Ind. 73, where the plaintiff sued the school trustees of a township for refusing admission to his children into a district school in such township, it was held that the plaintiff could not maintain the action, as the parent can only sue for such injuries to his child as occasion loss of service; for all other injuries the child must sue.

All the cases cited, holding that a parent cannot recover for the expulsion of his child from a public school, were put upon the common-law doctrine (Hall v. Hollander, 4 Barn. & Cress. 660, 5 East, 45; Flemington v. Smithers, 2 Carr. & Payne, 292, 578; Frazier v. Georgia Railroad Co., 101 Ga. 70, 28 S. E. 684, and citations) that a parent cannot maintain an action for an injury to his child which does not result in loss of service, or cause expense to the parent. We have been able to find only one reported case out of harmony with this rule, viz., Roe v. Deming, 21 Ohio St. 666, where it was held: "The father of a child entitled to the benefits of the public school of the sub-district of his residence may maintain an action against the teacher of the school and the local directors of the sub-district for damages for wrongfully expelling the child from the school." There was no further opinion rendered, and no authority cited. We do not agree to the soundness of this dictum. Counsel for plaintiff in error cites the case of Board of Education of Cartersville v. Purse, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593, 65 Am. St. Rep. 312, admitting, however, that "the Purse Case did not decide the question involved here, but [contending] the analogous line of reasoning would establish the soundness of our contention." In that case it was held, that a board of education having the charge and control of a system of free schools established by law and supported by taxation has the right to suspend from attendance upon school children whose parent, in undertaking to interfere with the discipline of a teacher over one of the children, enters the schoolroom of such teacher, during school hours, and, in the presence of the assembled pupils, is guilty of conduct toward such teacher which is subversive of the discipline of the school. The line of reasoning in the opinion in that case, delivered by Mr. Justice Cobb, led to the conclusion that "it would be contrary to the policy of our law, based as it is upon the common law, to bestow upon the child in the matter of its education any right independent of the parent." From this, counsel argues that it follows that when a child is wrongfully expelled from a public school, the right of action for such expulsion is in the parent, and not in the child. But the very opinion upon which counsel relies recognizes that there is a right of action in a child for his wanton and malicious expulsion or exclusion from a public school, in which he has been lawfully entered by his parent; and authorities to this effect are there cited. On page 444 of 101 Ga., page 904 of 28 S. E. (41 L. R. A. 593, 65 Am. St. Rep. 312), the learned justice said: "While it is the act of the parent or guardian which places the child in the school and puts him in a position where he can obtain the benefits of the system, this does not prevent a duty from arising on the part of the school authorities towards the child to abstain from unlawful conduct which would deprive the child of the benefit which the act of the parent has secured to him. The moment the child is placed in school this duty arises. A breach of this duty will be a tort for which the child can recover in a proper action against the person wantonly and maliciously depriving him of the benefits which he would receive from the school. * * * Out of this breach of duty damage arises to the parent, as well as to the child. The parent therefore has the right to appeal to the courts to compel the child to be admitted or reinstated, as the case may be, and also to appeal to the courts by his action for damages for the amount which he would be required to expend in the education of his child. The child would also have a right against the individual thus wantonly and maliciously depriving him of the benefit which is secured to him by the law in the event the parent sees proper to enter him in the school." The same learned justice, in the opinion rendered in Hurst v. Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43, said: "It does not, however, follow that the right of action for injuries of every character to a minor child is in the father alone. If the injury is one from which the father does not sustain any damage, that is, which does not destroy or impair the ability of the child to render services to the father, there is no right of action in the father for the wrong done the child." In the case with which we are dealing, if under the facts alleged a right of action existed, it was in the children, not in the father, and it is their right, not his, which he is seeking to exercise in his own behalf. He makes no claim for money expended in the education of his children, in consequence of their expulsion from the public school. Indeed his petition indicates that he spent no money for this purpose, as it shows that they were only out of the school about a month, during which time he was trying to get them reinstated therein. There is no allegation that he was put to any other expense by reason of their being expelled from the school. It is true that it is alleged that by reason of his having to pay attorney's fees he was injured, but what he paid such fees for is not alleged, nor the amount which he paid, nor that they were reasonable, nor whether the fees referred to were in the present case or in some other. Of course, in no event could he recover any attorney's fees for which he became liable in a case in which he sets out no cause of action. The petition was properly dismissed upon the demurrer.

Judgment affirmed.[7] All the Justices concur.

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[7] The action of the parent is entirely distinct and separate from the action of the child. Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37 (1907). Hence, a recovery by the child is no bar to a recovery by the parent. Wilton v. Middlesex R. R. Co., 125 Mass. 130 (1878); Forsythe v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731 (1899).

It follows that the parent can only recover as damages the pecuniary value of the actual services or earnings of the child to the parent during the child's minority. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (1902); Galligan v. Woonsocket St. Ry. Co., 27 R. I. 363, 62 Atl. 376 (1905); Missouri, K. & T. Ry. Co. v. Rodgers (Tex. Civ. App.) 39 S. W. 383 (1897); Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581 (1907). But there can be no recovery by the parent for the pain and suffering of the child. St. Louis S. W. Ry. Co. v. Campbell, 32 Tex. Civ. App. 613, 75 S. W. 564 (1903); Baltimore & O. S. W. Ry. Co. v. Keck, 89 Ill. App. 72 (1880). Or for loss of society of the minor. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (1902). Or for the anguish of the parent. St. Louis S. W. Ry. Co. v. Gregory (Tex. Civ. App.) 73 S. W. 28 (1903). Or for the support and clothing of the child. Birkel v. Chandler, 26 Wash. 241, 66 Pac. 406 (1901); Woeckner v. Erie Electric Motor Co., 182 Pa. 182, 37 Atl. 936 (1897).

Where there is actual damage to the parent in loss of services or earnings due to the wrongful act of a third party toward the child, the parent can recover, not only for all loss of past services and earnings of the child, but

OSBORN v. GILLETT.

(Court of Exchequer, 1873. L. R. 8 Exch. 88.)

Declaration, stating that at the time, &c., and thence until the time of her death, one Elizabeth Osborn was the daughter and servant of the plaintiff; that the defendant by John Broadwater his servant negligently drove a wagon and horses against the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died; whereby the plaintiff lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying to his house the body of the said Elizabeth Osborn, and was afterwards and necessarily put to and incurred expense in preparing for, and in and about and incidental to the burial of the same.

Pleas: 3. That the said Elizabeth Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitles him to sue in this action for the acts complained of.

4. That the acts and matters complained of in the declaration amounted in law to a felonious act by the said John Broadwater committed; and Broadwater at the commencement of this suit had not, and has not since, been tried, convicted, or acquitted of, nor in any manner prosecuted for, the said offence, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place.

Demurrer and joinder.

Picott, B. There are demurrers to the third and fourth pleas in this case. The action is brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured and killed, and in consequence the plaintiff lost her services, and was put to the expense of burying her.

By the third plea the defendant says that she was killed on the spot, and the first question is, whether this plea affords a good defence in law to an action by a master for damages sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been

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also for future loss of services and earnings during the minority of the child. Nederlandsch v. Hollander, 20 U. S. App. 225, 59 Fed. 417, 8 C. C. A. 169; Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65 (1888). In the latter case, however, damages due to a future surgical operation to the child could not be recovered for by the parent. The parent, having recovered damages in one suit up to the time of the commencement of that suit, cannot bring a new suit for the damages occurring since. Adm'r of Whitney v. Clarendon, 18 Vt. 252, 46 Am. Dec. 150 (1846).

so understood up to the present time; and if it is to be changed it rests with the legislature and not with the courts to make the change.

It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to shew that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in Baker v. Bolton, 1 Camp. 493. That was, no doubt, a nisi prius decision; but it does not appear to have ever been questioned. The ruling was, that the death of any human being could not be complained of as an injury—i. e., as an actionable injury; and the law as then laid down has found its way into the various text-books treating upon master and servant: 2 Chitty on Pleading (7th Ed.) p. 488, note. There was nothing in that case to shew that the negligence amounted to a felony, and, if death is caused without criminal negligence or by merely injudicious driving, it would not.

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act, 9 & 10 Vict. c. 93. The language is not confined to cases to which the maxim, "actio personalis moritur cum persona," applies, but is perfectly general:

"Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him."

The remedy is then given to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special damages of various kinds are sustained (master and servant being one) must have been present to the mind of the framers of the statute, and, if such had been the intention, an express remedy would have been afforded in cases where proximate special damage resulted from the death so caused.

Several American authorities were also cited which shew that the law in America has followed the ruling of Lord Ellenborough (Eden v. Lexington & Frankfort Ry. Co., 14 B. Mon. [Ky.] 204; Carey and Wife v. Berkshire Ry. Co., 1 Cush. [Mass.] 475, 48 Am. Dec. 616), but I do not think it necessary to rely upon these. The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognized by the legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial.

I think the fourth plea is bad, for the reasons given on the argument—viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution.

BRAMWELL, B. (This judgment was read by PIGOTT, B.) The fourth plea in this case is clearly bad. White v. Spettigue, 13 M. & W. 603, is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shews that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

Now, these pleadings shew a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable (see Hodsoll v. Stallybrass, 11 A. & E. 301), and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the cestui que vie. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the cestui que vie, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shewn to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of shewing this is on the defendant, who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, "actio personalis moritur cum persona." But that clearly means dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable, though she then died. Further, the maxim is "actio moritur," which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, "You killed my servant and caused me loss;" and the defendant's case is the same, "I did kill her, and therefore never was liable." The sense in which I say the maxim is to be understood is that put on it by Mr. Broom and the many authorities he cites in his Maxims (5th Ed., p. 904).

Next, Mr. Prentice relied on the recital of 9 & 10 Vict. c. 93, that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." And certainly the words are large enough to include this case. But in justice to whomsoever is responsible for it, we ought to see what was the subject-matter being dealt with. When that is done it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that whenever the death of a person shall be caused by a wrongful act, and the act "is such as would (if death had not ensued) have entitled the party injured to maintain an action," there the person who would have been liable if death had not ensued shall be liable, "notwithstanding the death of the party injured," that means killed; so that the death is to make a man liable to an action notwithstanding the death. But that the words "party injured" in the phrase "would have entitled the party injured" must mean the same as where they again occur, and, therefore, mean "party killed," the present case would be comprehended in this enactment; for the plaintiff is a "party injured." But it is manifest by section 2 that the cases the statute is dealing with are cases where no action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly drawn section of a statute, on which the Courts had to put a meaning from what it did not rather than did say. Franklin v. South Eastern Ry. Co., 3 H. & N. 211, at page 214.

The next authority relied on was Baker v. Bolton, 1 Camp. 493. Now, certainly, as reported, it favours the defendant's view, for Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a nisi prius case, the plaintiff got £100., and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query: "Quære.—If the wife be killed on the spot, is this to be considered damnum absque injuria?" 1 Camp., at page 294. Why should the answer to it be "Yes," as the defendant contends?

The next authority cited by the defendant is Higgins v. Butcher, Yelv. 89. According to that report the plaintiff shewed no damage to himself. He said his wife was beaten and died, to his damage. This shews no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in White v. Spettigue, 13 M. & W. 603, and which, as it does not give as the reason that death gives no cause of action, may be said by its silence on that to be in defendant's favour. The same case is reported by Noy (Noy, 18), who states the declaration, and in that report also no damage to the plaintiff is shewn. Then the Court say the king is to punish a felony, and Tanfield, J., is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant. This is rather an authority for the plaintiff than the defendant. This case is mentioned by Twisden in Cooper v. Witham, 1 Lev. 247, as depending on the act being a felony.

The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, 48 Am. Dec. 616, a case in the Supreme Court of Massachusetts. In one of the cases there reported, Skinner v. Housatonic Ry. Corp., an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, Carey and Wife v. Berkshire Ry. Co., an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the Court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, "If these actions, or either of them, can be maintained, it must be on some established principle of the common law." Now, that is true, and the principle is injuria and damnum, for which the defendant is responsible. The judgment proceeds, "and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported." With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favor, that injuria and damnum give a cause of action. It is for the defendant to shew an exception to this rule when the injuria causes death. If the case had been viewed in this way, the reasons of the Court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise. They then cited and relied on Baker v. Bolton, 1 Camp. 493, on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the Court, but suppose it may have passed sub silentio. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, Eden v. Lexington & Frankfort Ry. Co., 14 B. Mon. 204, is in the Kentucky Court of Appeals. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common law doctrine in the case of Baker v. Bolton, 1 Camp. 493. It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, White v. Spettigue, 13 M. & W. 603, shews its inapplicability here. The judgment proceeds: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this: "Wrongful death which causes a damage gives no action because it is death which causes it." The judgment proceeds to say "that damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear—viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should shew a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of Baker v. Bolton, 1 Camp. 493, there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on Master and Servant (3d Ed., p. 139), assumes as certain that this action would lie.

On the main question, then, I think the plaintiff entitled to judgment; but it seems to me clear that he is entitled to the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now, Reg. v. Vann, 2 Den. Cr. C. 325, 21 L. J. (M. C.) 39, shews he was bound to bury the child if he had the means, which he may have had. On this the judgment in the case of Eden v. Lexington & Frankfort Ry. Co., 14 B. Mon. (Ky.) 204, is express; so also in Baker v. Bolton, 1 Camp. 493, the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgment.

Kelly, C. B. I think the defendant is entitled to the judgment of the Court upon the demurrer to the third plea. No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority that such an action is maintainable. All the authority that exists is against it. Higgins v. Butcher, Yelv. 89, shews that a husband cannot maintain an action against one who kills his wife; and—by Tanfield, J.—a master has no action against one who kills his servant, though he loses his services. Here, however, the decision proceeds on the ground that the act is a felony; but upon this it may be observed that so would be the killing in the case before the Court if the act be such that the negligence makes it amount to manslaughter. In Baker v. Bolton, 1 Camp. 493, the facts are loosely stated, but they seem to shew that the action is founded on negligence, and that the plaintiff had been deprived of the assistance, which may mean the services, of his wife. But the decision did not proceed on the ground that the killing was a felony, Lord Ellenborough, observing, without any qualification, that, "in a civil court the death of a human being could not be complained of as an injury." Then we have the American cases, Carey and Wife v. Berkshire Ry. Co., and Skinner v. Housatonic Ry. Corp., 1 Cush. (Mass.) 475, 48 Am. Dec. 616, deciding that no action for loss of services is maintainable where death has been inflicted through carelessness. The case of Ford v. Monroe, 20 Wend. (N. Y.) 210, the point not having been taken, and being a nisi prius case, is of no authority. Finally, we have the express declaration of the legislature in Lord Campbell's Act that no action lies for damages sustained by the death of a human being, and the language of the preamble shews that it was intended to include more than is provided for by the operative enactments of the statute. Such, then, being the state of the authorities, I agree with my Brother PIGOTT that we must leave it to the legislature to provide for a case like this, and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

Judgment for the defendant on the demurrer to the 3rd plea; for the plaintiff on the demurrer to the 4th plea.

TROW v. THOMAS.

(Supreme Court of Vermont, 1898. 70 Vt. 580, 41 Atl. 652.)

Exceptions from Caledonia county court; Thompson, Judge.

Action by George W. Trow against William T. Thomas for damage to plaintiff's right in plaintiff's child by reason of the personal injuries inflicted upon the child by the negligence of the defendant. There was judgment for the plaintiff. After verdict the defendant moved, among other motions, for arrest of judgment upon the ground that the declaration did not set out any legal cause of action.

TAFT, J.[8] [upon the motion in arrest of judgment]. The question is presented whether the plaintiff can maintain an action against a person through whose negligence injuries are inflicted upon the plaintiff's infant child, too young to render service to its parent, to recover the necessary medical and other extra expenses in caring for the child until its death, such injuries resulting in death some months later. In cases of tort the general rule is that, if one person is injured by the negligence of another, a recovery can be had in all instances whenever there is legal injury and actual damages as the result of the injury. To constitute a tort, two things must concur: a wrongful act committed by the defendant, and proximate legal damage to the plaintiff. A master can maintain an action for the beating of his servant per quod servitium amisit. Mary's Case, 9 Coke, 113. The loss of service is the cause of action. The cases so holding are too numerous to need citation. This doctrine also applies to actions brought by a parent for injuries to his child, when brought for loss of the child's services. In such cases the right of action is founded on the relation of master and servant, and not on that of parent and child, and it applies in actions for seduction.

These actions are based upon loss of service, to which the master or parent is entitled. It is stated in some of the books that a father cannot maintain an action for a battery on his child unless he avers and proves a loss of service. But this rule is not in accord with the law of tort which gives a right of recovery for damages resulting from the negligent act of another; and Metcalf, J., states in the opinion in Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671, that the authorities cited in support of such a rule did not support it. In that case the father recovered for his trouble and expense in the care and cure of his child injured by a mischievous animal, and a like recovery was had in Durden v. Barnett, 7 Ala. 169. There is no reason why a parent cannot sustain an action for the tortious act of a defendant, when the act results in injury to the child, and loss to the parent by being put to damage and expense in the care and cure of the child, and fulfilling those obligations that the law imposes upon him in respect to his children. The parent is under a legal liability to take care of and support his infant children. There is no reason why a parent can maintain an action to recover damages sustained in the loss of service of his child that does not apply with equal force in aid of a recovery for the loss he is subjected to in nursing and caring for it when injured by the defendant's negligence. Logically, there is no reason why he may not recover the damages he is subjected to in respect to such nursing and care. We hold that he has the right to recover such expenses necessarily sustained by him during the life of the child. Such damages are not those resulting from the death of the child, such as the expense of the child's burial and the loss of services subsequent to its death; and his right to recover damages sustained prior to its death is not affected by the death of the child.[9]

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[8] Statement condensed from opinion, and only so much of opinion given as relates to the motion in arrest of judgment.

The plaintiff seeks further to recover the expense of providing suitable burial for the child. This he cannot do; for, as said by Rowell, J., in Sherman v. Johnson, 58 Vt. 40, 2 Atl. 707: "Authorities are numerous, and well-nigh uniform, that at common law the death of a human being affords no ground for an action for damages." In this latter cause the plaintiff recovered in the court below his damages for the medical attendance upon his son during his sickness, the expense of his burial, and the services of his son had he lived from the time of his death until the age of 21. There is no intimation in the case that there cannot be a recovery in a case like the one at bar. The court in that case were requested to charge that no damages could be recovered for the pecuniary injuries resulting from the death of the plaintiff's minor son. The request was denied, and a recovery permitted for the expense of caring for his son during life, his burial expenses, and his services until the age of 21 had he lived. The judgment was reversed. The court did not say that the plaintiff could not recover for his expense in the care for the child and in burying him, but said: "The court refused this request, but charged that the plaintiff might recover for loss of services of his son until he would have been of age. In this there was error, for the authorities are numerous, and well-nigh uniform, that the death of a human being, though clearly involving pecuniary loss, affords no ground for an action of damages." It is clear the court regarded the recovery of damages for the loss of services after death as the error. We hold that, if a minor child is injured by the negligence of another, the father, who is under a legal obligation to support the child, can maintain an action against the negligent person to recover the necessary extra expenses he is put to in caring for the child in its injuries which proximately resulted from the negligent acts, and such recovery may be had although the child subsequently dies, limiting the recovery to damages sustained prior to the child's death.[10] It is difficult to perceive why, upon principle, the parent cannot recover the damages, resulting from the death, e. g. the expenses of the burial, and for the loss of service of his child after death and before majority. But the rule stated in Sherman v. Johnson, supra, has long been regarded as controlling all actions brought for damages resulting from the death of a person. Such has been the unvarying law in England from time immemorial, which originated in cases when the death was felonious, the offense capital, and the private injury merged in the public offense. Whether this rule ought to apply in cases of negligence not felonious may be questioned, but such has been the settled doctrine in this country. Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580. One of the cases holding otherwise is Cross v. Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61, in which a recovery was permitted by a husband against a surgeon, whose negligence caused the death of the wife, for his costs, expenses, and loss of society. Considering the uniform decisions upon this question, and the provisions made by our statutes for damages resulting from death, we do not depart from the rule stated in Sherman v. Johnson, supra, whatever view we might take of it if the case were of novel impression. There was error in including in the judgment $24, the expenses which the jury found were the costs of the burial.[11] This disposes of all the questions argued.

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[9] Accord: Sykes v. Lawlor, 49 Cal. 236 (1874), where child was not killed; Southern Ry. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312 (1896), where child was killed; Covington Street Ry. v. Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725 (1872) child was killed. A fortiori, recovery can be had for loss of services and earnings actually occurring before the child's death. Harris v. Kentucky Lumber Co. (Ky.) 45 S. W. 94 (1898); Callaghan v. Lake Hopatcong Ice Co., 69 N. J. Law, 100, 54 Atl. 223 (1903); Natchez J. & C. R. Co. v. Cook, 63 Miss. 38 (1885); Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302 (1880).

It is clear also that when the damages actually already suffered are for expenses in curing and caring for the child and the child is alive, damages for prospective loss of services and earnings till the child reaches twenty-one, can be recovered. Blackwell v. Hill, 76 Mo. App. 46 (1898).

[10] Accord: Gulf, C. & S. F. Ry. Co. v. Beall, 91 Tex. 310, 42 S. W. 1054, 41

Judgment reversed, and judgment for the plaintiff to recover the amount of the verdict less the burial expenses of $24.

AMOS v. ATLANTA RY. CO.

(Supreme Court of Georgia, 1898. 104 Ga. 809, 31 S. E. 42.)

Action for damages. Before Judge Reid. City Court of Atlanta. January term, 1898.

LEWIS, J.[12] Anna Amos brought suit in the city court of Atlanta against the Atlanta Railway Company for a tort committed upon her minor son on October 18, 1895, alleging in her petition substantially as follows: At the time mentioned the minor son was thirteen years of age, and was engaged at work in the county chain-gang near the city limits, serving there a sentence of six months, which would have

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L. R. A. 807, 66 Am. St. Rep. 892 (1897); Southern Ry. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312 (1896); Callaghan v. Lake Hopatcong Ice Co., 69 N. J. Law, 100, 54 Atl. 223 (1903); Harris v. Kentucky Lumber Co. (Ky.) 45 S. W. 94 (1898); Covington Street Ry. Co. v. Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725 (1872); Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 Pac. 842 (1905), no damages proved.

[11] Accord: Callaghan v. Lake Hopatcong Ice Co., 69 N. J. Law, 100, 54 Atl. 223 (1903); Covington Street Ry. Co. v. Packer, 9 Bush (Ky.) 455, 15 Am. Rep. 725 (1872).

Contra: Southern Ry. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312 (1896).

[12] Part of the opinion is omitted.

expired in 77 days from the date of the injury. The injury resulted in the immediate death of her son, and was caused by the negligence of the defendant company, and without fault on the part of the deceased. The boy's services at the time were of the value of $10 per month. "Plaintiff was his only parent (his father having deserted plaintiff long ago), and she received the same [his services], and the boy lived with her before his confinement, and his services were at said time of the value aforesaid, and plaintiff alleges that she was entitled to the same, subject of course to the right of the State to temporarily confine him as a convict." The petition set forth the nature of the services the boy was capable of rendering, and which he did render to plaintiff prior to his incarceration; and further alleged that subsequent to the confinement he would have continued to render such services and contribute to her his earnings. The suit was brought for the lost services of the son, to which the plaintiff would have been entitled up to the boy's majority, had he not been killed. To this petition the defendant demurred upon the grounds: (1) That there is no cause of action set forth in plaintiff's petition against this defendant; (2) by the statements in plaintiff's petition it is clearly shown that the son of plaintiff was not, at the time of the alleged injury, rendering or capable of rendering any service to plaintiff. This demurrer was sustained by the court, and the plaintiff excepted.

1. The action in this case is founded upon the common-law right embodied in section 3816 of the Civil Code, which declares: "Every person may recover for torts committed to himself or his wife, or his child, or his ward, or his servant." The prevailing rule in England is, that if a tort upon a child results in its immediate death, there can be no right of action for lost services. This doctrine as laid down in the case of Osborn v. Gillett, Law Rep. 8 Ex. 88, has not only been adhered to in England, but has been adopted by several of the courts in America. It is certainly an anomaly in law to hold that, because death results from an injury the parent cannot recover damages for such a wrong, whereas if death had not resulted the right of action would lie. The rule denies any remedy where the injury is more aggravated and the damages sustained greater. On account of its absurdity, this court, as well as some others in the United States, has entirely ignored it, and has held that, although death results from the tort, an action for lost services can be maintained by the parent. Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Chick v. Southwestern Railroad Co., 57 Ga. 357; McDowell v. Georgia Railroad Co., 60 Ga. 320. But it is insisted by the defendant, that inasmuch as the injury to the child occurred at a time when its services could not be commanded by the parent, there can be no recovery; and the decision of this court in the case of Smith v. Hatcher, 102 Ga. 158, 29 S. E. 162, is relied on to sustain this position. In that case the suit was for the homicide of the child, based upon a new right given by statute to the parent, which did not exist at common law. Under the statute (Civil Code, § 3828),

the right is founded upon the dependency of the parent on the child at the time of the injury, and further upon the fact that the child was contributing to the support of the parent. The decision of the court is expressly founded on the use in the statute of the words "is" and "contributes" in the present tense, the court simply ruling that, under the statute as construed, the parent must, at the very time of the injury, be dependent upon the child; and the child at such time must be actually contributing to the parent's support. See opinion of Presiding Justice Lumpkin in that case. The action in the case now under review, however, is not founded upon this statute, but upon principles of the common law; and hence the decision above cited in no wise conflicts with the principle herein announced. Nor is the decision in the case of Allen v. Atlanta Street Railroad Co., 54 Ga. 503, in point. That was an action by a father for damages on account of the homicide of his infant child, and the decision was based upon the idea that the child, on account of its infancy, was, at the time, incapable of rendering any service. There is sound reason for that rule. It would be a matter of mere speculation as to when an infant, if ever, would reach an age when it could render service, and even if it should reach that period in its life when it would be old enough to work, the value of such services would depend upon the contingencies of mental and physical development, which could not be foreseen. In order to maintain this action, it is necessary that the child, at the time of its injury, should be actually capable of rendering service to the plaintiff. The contrary rule seems also to have prevailed in England, but in this country the decisions have been more liberal to the parent, and it is enough that the parent retains the right to claim the services of the child. 17 Am. & Eng. Enc. L. 385, 386.

In the case of Shields v. Yonge, 15 Ga. 356, 60 Am. Dec. 698, Benning, J., says: "May a father treat his minor son as his servant, and sue for an injury to the son, as for an injury to a servant? If the son be old enough to render service, the father may." To use an illustration presented in the argument of counsel for plaintiff in error: Suppose a child 18 years of age is attending college, and is a positive expense to his parent and renders no service whatever; we apprehend it would not be seriously contended that there could be no recovery by the parent for an injury to him. Or suppose the child should have a spell of illness for several months, and while in that condition should receive an injury, when at the time it was unable to render service on account of sickness; certainly this condition could not operate as a bar to the parent's right of action. Neither would it affect the right of a parent to have redress for such injuries because the child is, at the time, temporarily engaged in the service of another. In 1 Jaggard on Torts, pp. 451, 452, the rule is expressed in the following language: "It is not necessary to show that the child rendered valuable services. Pouring tea or milking cows, has been held to be an act of service. Services may continue, notwithstanding a temporary absence. Even a married daughter living apart from her husband may, in this sense, render services to her father. Proof of actual service of an infant is unnecessary. Right to service is enough. If the child is of age, there must have been loss of service to entitle the parent to recover. The legal right of the parent at the time to command the services, of the child, though she resides and is temporarily employed elsewhere, is sufficient. It rests on his legal obligation to provide for her support and education, and his consequent right to the profits of her labor. This fiction of service as the basis of the right of parent to sue for wrongs done the child is generally recognized in America, although much criticised." In the case of Boyd v. Byrd, 8 Blackf. (Ind.) 113, 44 Am. Dec. 740, it was held that a father could maintain a suit for the seduction of his unmarried daughter under twenty-one years of age, though she had previous to the seduction left her father's house with his consent, without intending to return, and with his license to appropriate her time and services to her own use. It is true that was a case of seduction; but it will be seen from the opinion delivered by Dewey, J., that the action was founded on the supposed relation of master and servant between the father and daughter, and his right to reclaim the services of such daughter. From authority then, as well as reason, we think that when the parent has not lost dominion or control over the child, but still has the power to claim its services during minority, he can recover for lost services resulting from a tort committed at a time when the child had the ability or capacity to render service. If the contention of the defendant in error be correct, then it matters not how short a time the parent may be temporarily deprived of the services of his child, he cannot recover for its injury committed during such time. If, for instance, a boy of sixteen years of age should be for one day imprisoned for a violation of some petty city ordinance, and an injury should be perpetrated upon him during his incarceration, resulting in his immediate death, the parent could not recover, although he would have had the right to reclaim the services of the child within a few hours after the infliction of the injury. We do not know that this exact question has ever before been decided by this court; but it seems to us that to hold otherwise than is herein ruled would be a construction of this common-law right as absurd and unreasonable as the old rule mentioned in the first part of this opinion, from which this court departed; namely, that there can be no recovery for lost services if death results from the tort. * * *

Judgment reversed. All the justices concurring.

MARTIN v. PAYNE.

(Supreme Court of New York, 1812. 9 Johns. 387, 6 Am. Dec. 288.)

This was an action of trespass on the case, for debauching and geting with child Lanah, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to expend a large sum of money for the expenses of her lying in, etc.

The cause was tried at the Washington circuit, in June, 1811, before Mr. Justice Spencer. At the trial the daughter of the plaintiff was produced as a witness, and proved the seduction, and pregnancy, etc., that at the time of the seduction, which was in the spring of the year 1810, she was 19 years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings, in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him, on the terms above mentioned, with the consent of her father. The defendant paid his addresses to her, while she was at her uncle's, and she expected to have married him; and had, at that time, no expectation of returning to her father's house to reside. During the period of her residence with her uncle, she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched, she returned to her father, who supported her, and was at the expense of her lying in, etc. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected, that the plaintiff was not entitled to recover; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff subject to the opinion of the court, on the facts in the case, as above stated.

SPENCER, J., delivered the opinion of the court. The case of Dean v. Peel, 5 East, 49, is against the action. It was there held that the daughter being in the service of another, and having no animus revertendi, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided, that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant, in such a case. In Bennet v. Alcott, 2 Term Rep. 166, the daughter was thirty years of age, and Buller, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in Postlethwaite v. Parks, 3 Burr. 1878, the action is not maintainable. In Johnson v. McAdam, cited by Topping, in Dean v. Peel, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced, but when she was of age, and no part of the father's family, he thought the action not maintainable. In Fores v. Wilson, Peake's N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, per quod, etc., Lord Kenyon held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding school, debauched and gotten with child, on what principle can the father maintain the action, but on the supposed relation of master and servant, arising from the power possessed by the father to require menial services; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case supposed is perfectly analogous to the one before us; here the father merely permitted his daughter to remain with her aunt; he had not devested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant de jure, though not de facto, at the time of the injury, and being his servant de jure, the defendant has done an act which had deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

Motion denied.[13]

[13] Accord: Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441 (1874), post, p. 84; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100 (1874); Emery v. Gowen, 4 Greenl. (Me.) 33, 16 Am. Dec. 233 (1826); Greenwood v. Greenwood, 28 Md. 369 (1867); Ellington v. Ellington, 47 Miss. 329 (1872); Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584 (1872); Vanhorn v. Freeman, 6 N. J. Law, 322 (1796); Mohry v. Hoffman, 86 Pa. 358 (1878).

Contra: Dean v. Peel, 5 East, 45 (1804); Blanire v. Haley, 4 Jur. 107 (1840).

DAIN v. WYCOFF.

(Court of Appeals of New York, 1852. 7 N. Y. 191.)

This action was brought by the plaintiff for the seduction of his daughter. It was tried at Tompkins circuit in April, 1850, before Justice Gray, when a verdict for one thousand dollars was rendered for the plaintiff. A motion for a new trial made upon bill of exceptions was denied by the general term of the supreme court in the sixth district and judgment given upon the verdict.

It appeared by the bill of exceptions that Sally Dain, the plaintiff's daughter, when about fourteen years of age was bound as an apprentice to the defendant, who shortly after seduced her and had criminal intercourse with her frequently, until she was sixteen years of age, when she became pregnant. She was then induced by him to take drugs with a view to produce an abortion, but the attempt to do this was unsuccessful and she gave birth to a living child.

Gardiner, J.[14] * * * 3. The defendant moved for a nonsuit upon the ground that the relation of master and servant did not subsist between the plaintiff and his daughter when she was seduced. It appeared that she was the apprentice of the defendant and bound to live with him until she was eighteen, and that the seduction occurred while she was thus in fact and in law the servant of the defendant. The relation of master and servant is the foundation of the action for loss of service. Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, and cases there cited. The plaintiff to maintain the action must have had the right to the service of his daughter. But he proved that she not only resided with the defendant but owed him service when the injury was committed. Unless the defendant procured the daughter to enter into his service with a view to her seduction, of which there is no pretence, the plaintiff should have been nonsuited.

We all agree that the judgment should be reversed, for the reason last suggested. My Brethren express no opinion upon the other points in the case.

Wells, J. (after stating the facts). It is abundantly settled by authority that in order to sustain an action of this description it must appear that the relation of master and servant existed at the time the injury complained of was committed. The action is founded on the loss of service, and in order to maintain it the relation must be actual or constructive. If the plaintiff is not receiving the services of his daughter at the time he must be in a situation and have the legal right to command them at pleasure. In this case the plaintiff's daughter was not at the time she was seduced and got with child his servant but was the servant of the defendant, who had the legal right to and was actually receiving her services. In the late case of Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, Bronson, Ch. J., has given the whole subject of the principles of this action a full examination, and it is unnecessary to repeat the views which are there so well stated. The case is in point and in effect decides this. According to the principles held by this court in the case referred to it is impossible for the plaintiff in the present case to sustain an action upon the proof which was given at the trial.

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[14] Statement abridged, and only part of opinion of Gardiner, J., given.

Judgment reversed and new trial ordered.

BOLTON v. MILLER.

(Supreme Court of Indiana, 1855. 6 Ind. 262.)

STUART, J.[15] Miller brought an action against Bolton for the seduction of his infant daughter. Verdict for Miller, assessing his damages at $1,100. Bolton appeals. * * *

First, then, it is urged that the Court erred in sustaining the demurrer to the second paragraph of the answer.

The paragraph to which the demurrer was thus sustained, sets up that Mary Miller was not, at, etc., the servant of the plaintiff, but owed and was then rendering service to the defendant, Bolton, as his apprentice, by virtue of a written agreement, dated January 31, 1845. The agreement, signed by Bolton and Miller, the father, but without seal and without acknowledgment, is set out in full. It stipulates that Mary, then nine years old, shall be bound to Bolton, as his apprentice, to learn the duties of housekeeping, for the term of nine years from the 16th of March, 1844, thereby expressly giving to Bolton the right and authority over Mary and her services, during that period. In consideration of which Bolton agrees to give her a year's schooling, and at the expiration of the term to give her certain specified articles of household furniture. That this agreement had not expired at the time of Mary's seduction, nor at the birth of her child; that at the time the child was born, Mary was living with Bolton as his servant; and that afterwards the contract was canceled by mutual consent of Miller and Bolton.

There were five other paragraphs leading to issues of fact, on which no question for our consideration is presented.

The alleged seduction occurred in June, 1850; the birth of the child in the spring following; at both of which periods, the answer assumes, she was the servant and apprentice of the defendant, and owed no service, actual or constructive, to her father. The question thus raised on demurrer is, whether the father had any right to control her services at the time of the seduction; and, as incident thereto, whether he had any right of action against Bolton for the loss of such service.

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[15] Parts of the opinion are omitted.

It is very properly conceded in argument that this indenture was not binding under the statute then in force in relation to "masters and apprentices." Article 5, c. 35, Rev. St. 1843. It was neither sealed, acknowledged, nor recorded, as required by that act. Many important statutory provisions, beneficial to the infant, are also wanting. The rights of Bolton, therefore, are not those provided by the statute; nor are his remedies to be found there. In case Mary had abandoned his service, Bolton could not avail himself of the process of reclamation pointed out in the 156th section of that act, and in those that follow. In brief, he could not, under that contract, have controlled her person or compelled her return; nor could he compel the father to return her. It is, therefore, clear that, under that contract, Bolton had not such legal control of her person as to compel her services.

The article set up, then, being merely a simple contract between Bolton and Miller, the remedy for its breach was by suit for damages. Had Bolton failed to give her the schooling and household goods, as stipulated, he would have been liable on the contract. Had the father taken his daughter from Bolton's service, without any just cause, it would have been a violation of the contract on his part. But we do not readily see how this contract could operate against the father by way of estoppel, or prevent him from reclaiming the person and services of his daughter, at any moment. Nor do we see any substantial ground of distinction between the case at bar and the numerous cases found in the books.

In Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288, the father had permitted his daughter, who was nineteen years old, to live with her uncle, at stipulated wages, for such time as she saw proper to work. The wages thus earned were expended by herself as she thought best. While living at her uncle's she was seduced. The Court held that the father had not divested himself of his power to reclaim her services, nor of his liability to maintain her and provide for her. She was still his servant de jure, though not de facto, at the time of the injury. The action by the father was accordingly sustained.

Clark v. Fitch, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639, was a case somewhat similar to the present. At the time of the seduction the daughter was nineteen years old; and was then actually living out at service. The child was born at the house where she was at service, and the expenses paid by a third party. From the time of the seduction till after the birth of the child, she had not been at her father's house. The father was even ignorant of the fact of seduction, and of the institution of the suit, till some time after. Yet the Court held, that notwithstanding the father had given the daughter her time, and had incurred no expense, he had a right to recall her at pleasure, and control her services; and that, having such right, the relation of master and servant continued, and the action was well brought.

In Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, the doctrine of actual and constructive service, as applicable to this species of action, is elaborately considered, with no very friendly feeling on the part of the Court to extending it beyond the authorities. The judge who delivers the opinion (Bronson, C. J.) says: "It is but natural that an upright magistrate should feel great indignation towards a seducer, and should sympathize warmly with those who have been injured; and judges have often regretted that the right to sue was confined within such narrow limits. It seems even to have been thought a reproach to our law that somebody should not have a right of action whenever an unmarried woman was gotten with child." Yet, from a review of all the cases, the Court, on that occasion, recognize the rule to be settled, that the relation of master and servant exists constructively between the father and his infant daughter, although she is actually in the service of another, at, etc., provided the father has a right, at any time, to reclaim her services.

This may be regarded as the American doctrine, as distinguished from the stricter rule as to service held in some of the English cases. It is the rule already adopted in this Court. In Boyd v. Byrd, the Court reviewed some of the leading cases, and adopted the rule of constructive service, in a case which may be thought quite as strong as this. There the father had given his daughter her time, while yet a minor. She accordingly left his house with his consent, about a year previous to the seduction, and without the intention of returning. She was residing with the seducer at the time, etc. This Court held the father could maintain the action. 8 Blackf. (Ind.) 113, 44 Am. Dec. 740.

In relation to the effect of regular articles of apprenticeship, as affecting the rights of the father, we would not be understood to intimate any opinion. That question is not before us.

The simple question, therefore, in this case, is, was Miller entitled to his daughter's services, at the time of the seduction? We are clearly of opinion that he was. This case can not easily be distinguished from those cited. She was an infant. There was no such contract between the father and Bolton as would enable the latter to hold her against the father's will. Had he reclaimed her without just cause, to Bolton's injury, the only consequence would have been to lay him liable to an action for breach of contract.

It is urged that the father, in this case, was at no expense for her sickness—paid nothing. Neither did the father pay anything in the case of Clark v. Fitch; but in both cases they were liable to pay. Neither the accoucheur nor nurse could have sustained an action against Bolton for the value of their services, unless under a special contract. No implied assumpsit would have arisen in their favor, against Bolton, from his position as the master or employer of Mary. Such implied assumpsit would have arisen against the father.

As applicable to the rights of the father, in this case, the agreement, in the light of the authorities cited, can be regarded as nothing more than a license to his daughter to appropriate her time and wages to her own use, till she was eighteen years old. That license he could recall at pleasure. We are, therefore, of opinion that the action is well brought, and the demurrer to the second paragraph correctly sustained.

As the contract was admissible in evidence under the fifth and sixth paragraphs of the answer, we must presume that the defendant had the full benefit of it. Indeed it elsewhere appears in the record that such was the fact. So that, even if the Court had erred in overruling the demurrer, the defense was not injured by it. Streeter v. Henley, 1 Ind. 401. * * *

Gookins, J., having been concerned as counsel, was absent.

Per Curiam. The judgment is affirmed, with 3 per cent. damages and costs.

NICKLESON v. STRYKER.

(Supreme Court of New York, 1813. 10 Johns. 115, 6 Am. Dec. 318.)

This was an action of trespass, for assaulting, debauching and getting with child the daughter of the plaintiff, per quod, &c. and was tried before Mr. Justice Thompson, at the Otsego circuit, in September, 1812.

The daughter, who was a witness for the plaintiff, at the trial, testified, that she was 29 years old. She lived with her father, the plaintiff, until a short time before her misfortune. She went to one Layton's, returned home, and, after a week, went back to Layton's to work, and while there, on the 24th of October last, her connexion with the defendant happened. She then went to her brother's, and did not return to her father's house until February. The child was born while she was at her father's house, and he took care of her during her illness, and was at the expense of her lying in, &c. While she lived with her father, she worked for him, when at home, and her earnings, during 7 or 8 years, when she went out to work, as occasion offered, were applied to pay for necessaries for the family. Her father did not, however, claim a right to her services, or to the wages she earned. She never went from home when her services were wanted. The defendant had paid attention to her for several years, at different places, and once while she was at the plaintiff's house.

The judge intimated an opinion, that the action was not maintainable; a verdict was taken for the plaintiff, subject to the opinion of the court, on a case; the jury having assessed the damages at 180 dollars.

N. Williams, for the plaintiff, contended, that the principle to be extracted from the cases decided in England, on this subject, which, however, he thought inconsistent, was, that though the daughter was above the age of 21 years, and not actually resident in her father's house when the injury was committed, and in no sense to be considered in the light of a menial servant; yet if she had not actually abandoned her father's house and protection, the qualified or supposed relation of master and servant still subsisted, so as to support the action. In the present case, though the daughter was above the age of 21 years, she considered her father's house as her home. She never left it while her services were wanted; and when she went out to work, it was, always, with the intention of returning to her father's house. There was no time when she did not possess the animus revertendi.

Though the later English decisions consider this as an action of trespass in all cases, yet there seems to be more reason and good sense in the opinion of Buller, J., who regarded it as an action of the case. Those decisions, taken altogether, are extremely absurd; and this court ought to be governed by the true principle on which this action is brought, which is for the injury which the father sustains, by being deprived of the society and comfort of his child, and the dishonour inflicted on the family by the loss of her character. Lord Ellenborough and Lord Eldon have, at the sittings, charged the jury to calculate the damages on those grounds, and to take into consideration the wounded feelings of the parent. Is it not utterly inconsistent and absurd, then, when such are admitted as the chief, if not the sole grounds of damages, to require, as essential to support the action, proof of actual service, or the relation of master and servant? This is really and truly an action on the case; and it ought to be sustained in all cases, where the daughter is not emancipated, by marriage, from the care and protection of her parent.

Foot, contra, was stopped by the court.

PER CURIAM. As the daughter, in this case, was 29 years of age, and not in the actual service of her father when she had the connexion with the defendant, the plaintiff cannot sustain the action. The rule is settled, that if the daughter be of age, she must be in her father's service, so as to constitute, in law, and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her. If she be under age, she is presumed to be under his control and protection, so as to entitle him to the action, whether she actually resides with him or not; and this was the decision of the court, at the last August term, in Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288, in which the authorities were reviewed, and this plain distinction taken and adopted.

Judgment for the defendant.[16]

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[16] Accord: Grinnell v. Wells, 7 Man. & Gr. 1033 (1844); Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486 (1820).

Observe that the child who is of age must be a de facto servant of the parent at the time of the seduction. It is not enough if such relation exists at the time of the confinement or damage. Thus, if the child, being of age, is seduced while out at service, but confined in her parent's house, the parent cannot sue. Davies v. Williams, 10 Ad. & El. (N. S.) 725 (1839); South v. Denniston, 2 Watts (Pa.) 474 (1834); Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338 (1850). So, if the child, being of age, and while a de

THOMPSON v. ROSS.

(Court of Exchequer, 1859. 5 Hurl. & N. 16.)

Declaration.—That the defendant, on the 1st of December, 1857, and on divers other days, debauched and carnally knew Frances Thompson, who then, and during all the time aforesaid was, and yet is, the servant of the plaintiff; whereby, the said Frances Thompson became pregnant until the 10th of October, 1858, when she was delivered of a child; by means of which the said Frances Thompson was unable to do or perform the necessary affairs and business of the plaintiff, being her mother and mistress as aforesaid, for a long time, &c.; and the plaintiff, during that time, hath lost and been deprived of the services of the said Frances Thompson.

Plea (inter alia).—That Frances Thompson was not the servant of the plaintiff.

Whereupon issue was joined.

At the trial, before Pollock, C. B., at the Sittings in Middlesex after Trinity Term, the plaintiff, who was a widow, employed by shirtmakers, proved that in May, 1857, Frances Thompson, her daughter, went into service in the family of one Ross, the father of the defendant, where she received wages in the ordinary way as a domestic servant. She remained in the service of Ross until April, 1858. It was further proved that during this time Frances Thompson used to assist the plaintiff in making shirts for shirtmakers. She did this work for her mother after her usual day's work was done, with the knowledge, and by the permission, of her mistress, Mrs. Ross.

The defendant's counsel submitted that there was no evidence of service; and the jury having found a verdict for the plaintiff, the learned Judge gave leave to the defendant to move to enter a nonsuit or verdict for the defendant on this ground.

Keane having obtained a rule nisi accordingly,

Pearce now showed cause.—No doubt the gist of the action for seduction is the loss of service; but working at shirtmaking for the benefit of the plaintiff was a sufficient service. In Bennett v. Alcott, 2 T. R. 166, it is said that in actions of this kind the slightest evidence of service is sufficient. Making tea might be a sufficient service. In Irwin v. Dearman, 11 East, 23, it was held that damages beyond the bare loss of service might be recovered by one who had adopted and

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facto servant in her father's house, be seduced while the father lives, but confined after his death, the mother cannot sue. Hamilton v. Long, 36 Irish L. T. R. 189 (1902). Contra: Coon v. Moffitt, 3 N. J. Law, 583, 4 Am. Dec. 392 (1809); Parker v. Meek, 3 Sneed (Tenn.) 29 (1855). The same principle controls in the case where the minor child is damaged by the negligence of a third party in the life of the father, but the father dies before suit is brought and the mother attempts to sue. In such a case the mother has no right of action. Geraghty v. New, 7 Misc. Rep. 30, 27 N. Y. Supp. 403 (1894).

bred up the daughter of a friend. [POLLOCK, C. B.—It is difficult to say that any person living in a house as an inmate and relation is not bound to obey the reasonable orders of the head of the home.]

Keane, in support of the rule.—All the cases show that there must be a real service in order to enable a plaintiff to maintain an action for the seduction. If the evidence in the present case were sufficient, it would be enough if a servant went home occasionally on Sunday, and then made tea for her parents.

POLLOCK, C. B.—We are all agreed that there was no service in this case. The service must be a real, genuine service, such as a parent, master, or mistress may command. Here the girl did work for her mother, by the consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to entitle the parent to sue for the loss of such service, a parent might sue in the case of a domestic servant going home on Sunday evenings and making tea there. But here, as in that case, there was merely a permission which at any moment might have been withdrawn. The entire services of the girl belonged to her master. However painful it may be that there should be wrong without a remedy, we must leave the law as we find it. We cannot make that a service which was no service. The rule therefore will be absolute to enter a nonsuit.

BRAMWELL, B.—I entirely agree. Our duty is to administer the law as we find it—not to amend it. The law is that an action for seduction is only maintainable where the relation of master and servant exists. Is there any evidence that such relation existed here? In the ordinary case of a person living in a house as a member of the family, it is very reasonable to hold that the relation of master and servant (determinable at will) exists between the parties. There is no evidence that any such relation existed here. It is not impossible that one servant should have two masters: he might serve one by day and another by night. But the legitimate inference from the facts here is, that this young girl was servant to Mrs. Ross at every minute of the day. She could not, therefore, be at any time the servant of another.

WATSON, B.—I am of the same opinion. The action is founded on the loss of service. The plaintiff has enjoyed certain advantages by the permission of the girl's mistress. The loss is not a loss of the services of the girl, but of the benefit of the permission of the mistress.

CHANNELL, B., concurred.

Rule absolute.[17]

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[17] Hedges v. Tagg, L. R. 7 Ex. Cas. 283 (1872).

BEAUDETTE v. GAGNE.

(Supreme Judicial Court of Maine, 1895. 87 Me. 534, 33 Atl. 23.)

WISWELL, J.[18] Action on the case by a father for the seduction of his adult daughter. The defendant alleges exceptions for the following causes:

* * * * * * * * * * *

IV. Lastly, exception is taken to the refusal of the court to instruct the jury that unless the services rendered by the daughter were such as the plaintiff could command and were not voluntary on her part, the plaintiff could not recover.

This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a minor daughter such relation is presumed to exist between her and her father, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. This was decided to be the law in this State in the case of Emery v. Gowen, 4 Greenl. 33, 16 Am. Dec. 233, a case which has been frequently cited and followed by the courts of other states.

The learned justice who presided, in his charge to the jury, fully and clearly explained the somewhat peculiar rules of law which are applicable to an action of this kind, in the course of which he said: "But if, at the time of the seduction, she is of age, that is, more than twenty-one years of age, then it must appear that the family relations continued to exist, that she was at least a resident of her father's family and performed some service. But it is held that the most trifling services, under those circumstances, are sufficient to create the relation." This instruction was all that the defendant was entitled to and was in accordance with the weight of authority. See Emery v. Gowen, supra; Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Davidson v. Abbot, 52 Vt. 570; Martin v. Payne, 9 Johns. (N. Y.) 388, 6 Am. Dec. 288, and cases collected in Am. & Eng. Encycl. of Law, vol. 21, pp. 1009 to 1017, under title of Seduction.

It is not necessary that the services of an adult daughter should be such as the father can command. Ordinarily a father cannot command the service of a daughter of age,—he cannot compel the service of his child over twenty-one as he can that of his minor child. It is sufficient if by mutual assent the relation of master and servant did in fact exist.

Exceptions overruled.[19]

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[18] Part of the opinion is omitted.

[19] Accord: Maunder v. Venn, 1 Moody & M. 323 (1829); Hudkins v. Haskins, 22 W. Va. 645 (1883).

It is not necessary to the maintenance of the action by the parent that

SECTION 3.—RIGHTS OF PERSONS, OTHER THAN THE FATHER, TO THE EARNINGS AND SERVICES OF THE CHILD

FURMAN v. VAN SISE.

(Court of Appeals of New York, 1874. 56 N. Y. 435, 15 Am. Rep. 441.)

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages for the seduction of plaintiff's daughter by defendant.

At the time of the seduction the daughter was eighteen years old and was in the employ of defendant's father; her father was dead. The agreement under which she was working was made between plaintiff and the employer. Under the agreement the wages were to be and were paid to the daughter. The daughter became pregnant. She returned to plaintiff's house, who cared and provided for her during confinement.

Grover, J. There was no proof of a marriage of the plaintiff subsequent to the death of her husband, the father of her daughter Sarah E. Fleet, nor any suggestion of such marriage upon the trial. No question in relation to the effect of such a marriage having been then made none can be made in this court.

The only question arising upon the exceptions taken is, whether the mother of a minor daughter, whose father is dead, seduced while in the employment of another, under an agreement made by the mother, the daughter receiving the pay for her services and applying it to her own use with the assent of the mother, the daughter returning to the mother after such seduction, by whom she is taken care of during her confinement and who pays the expenses thereby incurred, can maintain an action against the seducer for the injury. An examination shows that there is great conflict in the authorities upon this question; the weight of the authority in this State sustaining the right of the mother, while the cases in the English courts and in some of the States of this

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there should be any pregnancy or sexual disease. It is enough that in consequence of the seduction the health of the child, physical or mental, is in any wise impaired. Vanhorn v. Freeman, 6 N. J. Law, 322 (1796); Abrahams v. Kidney, 104 Mass. 222, 6 Am. Rep. 220 (1870); Blagge v. Ilsley, 127 Mass. 191, 34 Am. Rep. 161 (1879).

Note on Rule of Damages.—Damages allowed in an action for seduction are not only for loss of service, but also for the wounded feelings of the parent, who is plaintiff. Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633 (1840); Lipe v. Eisenlerd, 32 N. Y. 229 (1865); Palmer v. Baum, 123 Ill. App. 584 (1905).

country hold a contrary doctrine. In Sargent v. ———, 5 Cow. 106, Gray v. Durland, 50 Barb. 100, Simpson v. Buck, 5 Lans. 337, and Damon v. Moore, 5 Lans. 454, it was held by the Supreme Court of this State that the mother could maintain the action under such circumstances. I am not aware of any decision to the contrary by that court. The question has never been determined by the court of last resort, but must be in the present case. A discussion of the case pro and con is unnecessary, as this has been very well done by Miller, J., in Gray v. Durland, 50 Barb. 100, who gave the opinion of the court in favor of the right of the mother, and by Hogeboom, J. (Id. 211), who gave a dissenting opinion in the same case. In these opinions numerous authorities are cited and somewhat exhaustively considered. A perusal of these opinions shows that many authorities may be cited upon both sides. I shall content myself with a brief statement of the grounds upon which I think the action may and should be maintained.

It is well settled that the father of a minor daughter, seduced while in the service of another, may maintain an action for the injury provided he retains the right of recalling her into his service. It follows that a mother has the same right provided she has the right to the services of the daughter; one ground for maintaining the action being a real or supposed loss of services of the daughter. To sustain the action upon this ground, the relation of master and servant must in fact exist between the plaintiff and the female seduced, or constructively, by the plaintiff having the right to her services. It is insisted by the counsel for the defendant that a mother has no legal right to the services of her minor children after the death of the father, that the law gives this right to the father only. In Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, Bronson, J., says in his opinion that the mother has no such right; but the question was not involved in the case. In Re Ryder, 11 Paige, 185, 42 Am. Dec. 109, Chancellor Walworth says that the mother has this right. The determination of the question was not necessary to a disposition of the case. When two such jurists are in direct conflict upon the question, it may be regarded as an open one, to be considered upon principle. To arrive at a correct conclusion it is necessary to inquire into the basis of the father's right to the services of his minor children. This is derived from the obligation the law imposes upon him to maintain, educate and protect the child during infancy and early youth, and continues until the child is in a condition to provide for its own maintenance. The law has determined that he is so capable upon attaining the age of twenty-one years. The common law imposed no obligation upon the parent to maintain the child after it attained maturity, so as to be able to provide for itself; but that matter in England and this country is regulated by statute. To the credit of mothers it may be remarked that little will be found in the books in relation to enforcing the duty of taking care of their infant children after the death of the father, owing, doubtless, to the fact that the strong maternal affection provided by nature has been adequate to secure the performance of this duty. That it is a legal duty is, nevertheless, declared by elementary writers. Kent's Com. 188, 189. Again (225), it is said that the father, and on his death the mother, is generally entitled to the custody of infant children, inasmuch as they are their natural protectors, for maintenance and education. At page 190 it is said that the father is bound to support his minor children if he be of ability, even though they have property of their own. But this obligation in such a case does not extend to the mother; and the rule as to the father has become relaxed; thus clearly implying the legal duty of the mother to support her infant offspring, if of ability, and the latter have not the means of providing for their own support. That parents are bound to provide for and maintain their infant offspring results from the law of nature, and is enforced upon both according to their ability; primarily, during their joint lives, upon the father, he generally having more ample means applicable to the purpose; but after the death of the father the same law casts this duty solely upon the mother, who must, if of sufficient ability, maintain, educate and take care of her infant children. As a result of this obligation, she is entitled to the custody and control of such children; succeeding in this respect, not only to the obligations and duties primarily resting upon the father during life, but also to his right of custody and control and to the services of the children. As above remarked, the authorities upon the question were thoroughly considered in the opinions in Gray v. Durland, 50 Barb. 100. The effect of a subsequent marriage of the mother upon her obligations and duties to the children, and her right to their custody and services, is not involved in the case and will not be considered. The plaintiff being entitled to the services of her infant daughter, the action can be maintained upon the ground of loss of service.

But there is another ground upon which I think the action may be maintained. Both father and mother are, by statute, made liable for the support of their indigent children, irrespective of their age. Sarah Fleet was able to, and, as the case shows, did, prior to the injury, earn her own support. In consequence of the injury she became unable to do this, and the plaintiff as her mother did for a time provide for and take care of her, presumably, in performance of the obligation imposed upon her by law. Thus, the wrongful act of the defendant resulted in a direct pecuniary injury to the plaintiff, for which the law gives her a right of action against him. I can see no reason why the action should not be maintained equally upon this ground as upon a loss of service.

My conclusion is that the judgment should be affirmed, with costs.[20]

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[20] Accord: Gray v. Durland, 50 Barb. (N. Y.) 100 (1867). See, also, Natchez, J. & C. R. R. v. Cook, 63 Miss. 38 (1885); Scamell v. St. Louis Transit Co., 103 Mo. App. 504, 77 S. W. 1021 (1903); Bradley v. Sattler, 156 Ill. 603, 41 N. E. 171 (1895); Contra: South v. Denniston, 2 Watts (Pa.) 474 (1834); Roberts v. Connelly, 14 Ala. 235 (1848).

Whenever there is a de facto relationship of master and servant existing

ALLEN, J. (dissenting). The appellant presents but a single question for the judgment of this court, and that is upon the right of the plaintiff to maintain the action. The action itself is an anomaly in many of its aspects, and, if a wise public policy demands its preservation, discreet legislation could do much by so limiting and regulating it as to make the real purpose and object more consistent with the technical ground upon which it rests, and upon which alone it can be sustained, and declaring by whom, and under what circumstances, it may be brought.

In maintaining the action, the relation of parent and child is ignored, and that of master and servant alone recognized. A loss of service to the master is at the foundation of the action, and the plaintiff can only count as master for the damages resulting from such loss of service, and the loss and expense of nursing and attending the female during her sickness, but the real purpose of the action is to punish the seducer and obtain compensation for injured honor, wounded feelings, and family disgrace, and effect is given to it for these purposes so that the original and technical foundation of the action is ignored, except for the mere purpose of giving the plaintiff a standing in court. The mere relation of parent and child will not give a right of action for the seduction of an unmarried female, but the relation of master and servant, either actual or constructive, must exist, and the female seduced must be in the actual service of the plaintiff, although the service in fact rendered may be the most trifling and inconsiderable, or the plaintiff must be of right entitled to demand and have her services.

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between the mother and the child, although it arise only out of the presence of the child in the mother's household and the doing of trivial services, the mother, it seems, must have such a right in the child as will support an action for damage thereto. Horgan v. Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504 (1893); Savannah, etc., Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157 (1894).

The same is true whenever the legal right of a father has been transferred to the mother. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (1902); Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593 (1876).

But the amount of damages recovered may depend upon whether the mother recovers upon the theory that she succeeds to the father's legal right to the services and earnings during minority, or solely because she is the de facto mistress of the child at the time, without any power, however, to continue that relationship toward the child except with its consent.

On the effect of a statute providing that a married woman who is the mother of a minor child and contributes towards its support and education shall have the same control over it and the same equal right to its custody and services as is possessed by her husband, who is its father, to give the mother a right to recover in her own name for loss of the services of the child through the negligence of another: O'Brien v. City of Philadelphia, 215 Pa. 407, 64 Atl. 551 (1906).

In Keller v. St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391 (1899), it was held that, where a father had been deprived of the custody of the child by a decree of divorce and the custody awarded to the mother, the duty of maintenance was so far continued in the father that he was entitled to the child's services and earnings, and hence the mother could not sue for damages to any alleged right of hers in the child.

She must be under his actual or constructive control and dominion, but if she is under the age of twenty-one years, and resides with her father, no proof of actual service is necessary. Hewit v. Prime, 21 Wend. 79. If such a relation as that described exists between the plaintiff and the injured female, it matters not whether the plaintiff be the parent or merely stands in loco parentis, and an uncle or aunt, a step-father or one having no affinity to the female who has been wronged can sustain the action. Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Thompson v. Millar, 1 Wend. 447; Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Mulvehall v. Millward, 11 N. Y. 343; Dain v. Wycoff, 7 N. Y. 191; S. C., 18 N. Y. 45, 72 Am. Dec. 493. In England it is not enough that the plaintiff is legally entitled to the services of the female, she must be in his actual service at the time, and if she is in the service of a third person, the father cannot maintain the action. Blaynin v. Hailey, 6 M. & W. 55; Grinnell v. Wells, 7 M. & G. 1033. The wrongful act for which the wrong-doer is liable is the seduction. That is the invasion upon the rights of others for which the law holds him responsible, and whether the action is trespass quare clausum fregit, the debauching of the servant being alleged in aggravation of damages, or on the case strictly a per quod action is not material. Although the loss of service as the result of the wrong is essential to the action, the relation of master and servant must exist at the time of the injury, and if it does not it will not avail that it does exist at the time of the lying in and consequent loss of service. Martin v. Payne, Thompson v. Millar, and Bartley v. Richtmyer, supra; Ingersoll v. Jones, 5 Barb. 661; Dain v. Wycoff, supra; Mulvehall v. Millward, supra; Davis v. Williams, 10 Q. B. 725; South v. Denniston, 2 Watts (Pa.) 474. These and other authorities to which reference might be made are in conflict with Sargent v. ———, 5 Cow. 106, and Coon v. Moffet, 3 N. J. Law, 583, 4 Am. Dec. 392. Judge Bronson, in Bartley v. Richtmyer, says: "It is quite clear that the reasoning of Mr. Justice Sutherland, in Sargent v. ———, cannot be supported;" and Gibson, Ch. J., in South v. Denniston, places the action upon the same footing as an action for beating or maltreating a servant, and makes no distinction between a loss of service occasioned by beating or impregnation. It is quite clear that no action would lie for beating one who was not in the plaintiff's employ at the time, and there is no good reason why an action should lie for a seduction accomplished before the existence of the relation of master and servant existed. In the language of Gibson, Ch. J., it is an act of folly for one to employ an unfit person as a servant. Upon this point Sargent v. ——— and Coon v. Moffet must be regarded as overruled.

Was, then, the daughter of the plaintiff at the time she was debauched by the defendant in her actual or constructive service? Had the plaintiff the legal right to claim the services of the daugher? If so there can be no doubt of her right to maintain the action. Had the daughter at the time resided with the plaintiff as a member of her family and been supported and maintained by her, her right to the action would hardly be questioned. The relation of mistress and servant would have been implied from the other relation of parent and child, without proof of any actual service rendered by the daughter to the mother. The fact that the daughter remained in the family of the mother and was supported by her would give her the legal right to such services as are usually rendered by children to parents in the same station of life. At least the circumstances would authorize the presumption that such services were rendered, and that they were lost to the mother by the sickness and inability of the daughter to render them. Andrews v. Askey, 8 C. & P. 7; Hewit v. Prime, supra.

In this case, the daughter was at the time of the injury, and had been for some four years, in the service of the father of the defendant as a servant in his family, and received, as the referee finds, five dollars per month, paid to her by him under an agreement with the plaintiff. The only evidence upon this point is by the daughter, and she merely states, after referring to the time she had lived at the elder Van Sise's: "I did housework there; I was to have five dollars a month wages; I went from home when I went there; Mr. Van Sise and my mother made the arrangement when I went there; Mr. Van Sise paid me; he paid me just when I wanted it; I did not keep any account of it myself." During the four years the plaintiff, so far as appears, neither exercised any control over the daughter, contributed to her support, or claimed any part of her earnings. Before her lying in, the daughter left the service of Van Sise and went to service in the family of a Mr. Murray and remained there till she became disabled, and then returned to her mother's house, and was there confined. There was no evidence that the mother was consulted or had any agency in the change of service from Van Sise's to Murray's. The hiring to Van Sise was not a hiring for wages to be paid to the mother, but rather a hiring by the daughter under the advice and with the aid of the mother. The plaintiff's claim must rest upon the legal right to the services of the daughter, and if that is established, as there was no contract or covenant or other legal impediment to hinder the plaintiff from reclaiming the daughter and her services at the time of the wrong done, the relation of mistress and servant constructively existed, and the action can be maintained. Clark v. Fitch, Martin v. Payne, and Mulvehall v. Millward, supra.

The statutes of the State imposing upon the mother the duty of supporting her indigent children (1 Rev. St. 614, § 1), or requiring her consent, in case of the death or disqualification of the father to act, to the binding out of her children as apprentices (2 Rev. St. 154, §§ 1, 2), or taking from the father the power to bind his child to apprenticeship or service, or to create any testamentary guardian for them, unless the mother, if living, shall, in writing, signify her assent thereto (Laws 1862, c. 172, § 6), do not bear upon the question. The claim that the first mentioned statute, and the contingent obligation to support the child imposed by it upon the mother, gives to her a general right to the service of the child as correlative to the obligation imposed, is answered in Smith v. Boyer, 2 Watts, 174. The second of the statutes was designed for the protection of the infant; and in case the father and mother are both dead or incapacitated to act, the consent of public officers to the binding is required. The last of the acts referred to only gives to the mother a negative upon the common-law rights of the father, but confers no affirmative rights upon her.

Neither does the fact that in certain cases, and among them in case of the death of the father, the mother is entitled to the guardianship, affect the question. A guardianship carries with it no obligation to support, except from the means of the ward, or right to service; and it terminates when the ward arrives at the age of fourteen years, if the ward so elects. 2 Rev. St. 150.

These statutory modifications of the rights and obligations of parents do not confer upon the widowed mother any right to the services of an infant child, and her right must depend upon the common law, which, subject to the power of alteration vested in the legislature, is a part of the law of the State. Const. art. 1, § 17. Should we be of the opinion that any distinction between the parents as to their authority, rights and obligations in respect to the children was without foundation in principle, and that the duties of parents to their children rest equally upon the father and the mother, and that their rights were the same by the law of nature, we should still be bound to declare the law as we find it, and leave it to the legislature to give to the mother any just and natural rights over her children and to their services which the common law does not accord her. It is not denied even by those who go the farthest in the maintenance of the right of the widowed mother, so long as she remains unmarried, to something more than the reverence and respect of her minor children, that the law does distinguish between the father and mother, as well in regard to the obligations to support them as the right to command their services; and judges have found it necessary to discover some special ground for taking individual cases out of the rules of the common law. The right of parents to the services of their children results from their duties; and the duty of the father to support his infant child is absolute, irrespective of the means of the child or his ability to care for himself; and from this results the absolute right to the services of the child during his minority. The obligation of the mother to support her children is qualified, and only exists when they have no means and are incapable of supporting themselves. The duties and rights of parents being correlative, and the father and mother not being under the same obligations or bound to the same duties, it legally follows that their rights are also different. But whatever may be the reason of the rule, it is well settled, and quite too firmly established as a part of the common law to be changed by judicial action, that, while the father is entitled to the services of his minor child and the constructive relation of master and servant exists between them, notwithstanding the child may be temporarily in the actual service of another, the mother is not entitled to the service of her child except when such child is living with and supported by her; and that when the child is in the actual service of another the relation as mistress and servant does not exist between them. The law does not recognize that relation as constructively existing between a mother and child, and the mother can only claim the benefit of the relation so long as it actually exists. 1 Bl. Com. 453, per Bronson, J.; Bartley v. Richtmyer, supra; Davis v. Williams, 10 Ad. & El. 725; Commonwealth v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412; Smith v. Boyer, supra; Pray v. Gorham, 31 Me. 240; Whipple v. Dow, 2 Mass. 415.

The authorities bearing on this question are collated and well reviewed, as well in the dissenting opinion of Hogeboom, J., as in the prevailing opinion of Miller, P. J., in Gray v. Durland, 50 Barb. 100, 211; and it would lead to a repetition of much that is said by the learned judges in that case, to refer to the decisions in detail. Suffice it to say, that the great preponderance of authority is, as we think, with the dissenting opinion and adverse to the judgment in that case. It being conceded that the right to the service of a child rests upon the duty of the parent to support it, and that that duty does not rest upon the mother as it does upon the father; and that while the dominion of the father over the child continues until it arrives at its legal majority, the right of the mother is only to the guardianship of the child until it arrives at the age of fourteen; and that such right may, except as prevented by statute, be defeated by the testamentary right of the father, and there is but little foundation under the common law for the claim of the mother to occupy in all respects the position of the father as the head of the family, with dominion over the children and their services after his death. Simpson v. Buck, 5 Lans. 337, was decided upon the authority of Gray v. Durland, and is adverse to the current of authority. In Coon v. Moffet, supra, the judgment was reversed by the majority of the court, who thought the action maintainable for an error in the charge to the jury as to the measure of damages; but the opinion of Kirkpatrick, Ch. J., was against the maintenance of the action, for the reason that the relation of mistress and servant did not exist, and that there was no evidence or circumstance from which a constructive service could be raised, as the law does sometimes in consideration of maintenance.

In Campbell v. Campbell, 11 N. J. Eq. 268, the Chancellor says, in substance, that the mother, upon the death of the father, as the natural guardian, is entitled to the earnings of her children during their minority, but that this general principle may be rendered inapplicable from various circumstances, and the principle was not applied in that case; the mother having permitted the child to leave her roof and provide for himself, it was regarded as an emancipation of the child, clothing him with authority to receive his own wages. And see Jenness v. Emerson, 15 N. H. 486. Osborn v. Allen, 26 N. J. Law, 388, was an action by the mother for the wages of her son, a minor, the husband having been absent and not heard from for a time that authorized the legal presumption of his death. The son lived with the mother, submitted to her control, and made no claim for his wages, and the contract of hiring was with the mother; and by reason of the circumstances, rather than upon the legal right of the mother to the services of the son, the judgment was for the mother. Elmer, J., says: "Under these circumstances, I think the court, judging of the facts as a jury might, if the trial had been before a jury, had a right to infer that the defendant expected to pay the plaintiff, and contracted with her to do so." Potts reasons to the same effect, and Vandenburgh, J., concurred. The learned Chief Justice (Green), whose opinion is entitled to great weight, is very decided in favor of the legal right of the mother, the father being dead, to the services of her infant children as the father would be if living, and is of the opinion that the adverse proposition, as stated 2 Blackstone's Commentaries, 453, and Commonwealth v. Murray, 4 Bin. (Pa.) 487, is not consistent with the principles of natural law, with the rules of common law or with the dictates of sound public policy. No common law authorities are cited in support of the opinion, and it is not enough that a sound public policy or the principles of natural law demand that all the rights claimed for the mother should be accorded her, so long as the rules of the common law are against it, as that is the law which this court must administer until it is changed by the legislature.

These views lead to a result different from that to which I would gladly have come. If actions of this character are to be encouraged or permitted, there is every reason why a mother, the father being dead, should have it against the destroyer of her daughter. But it is for the legislature to give the action, courts can only declare the law as they find it.

The judgment should be reversed and a new trial granted.

All concur for affirmance except ALLEN and FOLGER, JJ., dissenting.

Judgment affirmed.

WHITAKER v. WARREN.

(Supreme Court of New Hampshire, 1880. 60 N. H. 20, 49 Am. Rep. 302.)

Debt, upon the statute, for double damages for injuries to the plaintiff's adopted minor child from the bite of the defendant's dog. A second count declares upon the same injuries to the plaintiff's servant. Subject to exception, the plaintiff amended his declaration by adding a count in case for the same injuries to the plaintiff's adopted minor child.

The child died from the effects of the biting about ten weeks after he was bitten. It was given to the plaintiff by its parents when it was but a few months old, and had lived in the plaintiff's family and been treated as his own child ever after. The plaintiff procured the child's name to be changed, but he had not by legal proceedings adopted it.

The plaintiff claimed to recover the expenses incident to the sickness and death of the child, and for loss of its services and society to the time of its death.

The defendant claimed that the action could not be maintained; that the facts stated are not sufficient evidence of the relation of parent and child, or master and servant; that, if they were, the right of actions was barred, for the reason that the statute on which it was founded was a penal statute.

STANLEY, J. The court were authorized to allow the amendment, to prevent injustice. Whether or not it was necessary for this purpose depended upon facts, the existence of which must be established at the trial term, where the question of amendment is to be determined.

The defendant claims that the plaintiff cannot recover, because neither the relation of parent and child, nor that of master and servant, existed between the plaintiff and the deceased; but the facts stated are evidence tending to show that the plaintiff stood in loco parentis to the child, and while this relation existed, the plaintiff was entitled to all the rights of a parent. Freto v. Brown, 4 Mass. 675; Mulhern v. McDavitt, 16 Gray (Mass.) 404; Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Rep. 301; Cooley, Torts, 235. This being the case, the plaintiff is entitled to recover for nursing and care of the child after the injury and while it lived, and for medicines and medical attendance. For the personal injury to the child he cannot recover (Hall v. Hollander, 4 B. & C. 660; Dennis v. Clark, 2 Cush. [Mass.] 347, 351, 48 Am. Dec. 671; Bouv. Inst. § 2289), nor for loss of service, without evidence to that effect (Woodward v. Washburn, 3 Denio [N. Y.] 369, 371; Stephenson v. Hall, 14 Barb. [N. Y.] 222; Hall v. Hollander, supra; Dennis v. Clark, supra; Franklin v. South Eastern Railway, 3 H. & N. 211; Cooley, Torts, 226; Wood, Mas. & S. 441, 442, 443).

The right of the parent to recover for loss of services caused by injuries inflicted by third persons, is founded upon the fact that he is entitled to the earnings of the child during its infancy (Jenness v. Emerson, 15 N. H. 486; Schou. Dom. Rel. 344, 631); and it stands on the same ground as the right of a master to the labor and services of his apprentices (Schou. Dom. Rel., supra; 2 Kent, Com. 192 et seq.). The plaintiff standing to the child in loco parentis, we cannot say that he is not entitled to recover for the loss of his services. His right to recover is not absolute; it depends upon whether there has in truth been a loss of services, whether the child was capable of rendering services, and whether the plaintiff has been deprived of the services by the defendant's wrongful act. If the jury should so find, the plaintiff is entitled to damages from the time of the injury until the child's death,—such damages as will be a full compensation for the loss sustained during that period. Ruth. Inst. b. 1, c. 22, § 1; Greenl. Evid. § 253; Field, Dam. 21; Wyatt v. Williams, 43 N. H. 107. Whether he can recover for loss of service after the death and during its infancy, is a question on which we express no opinion.

The point that the action is penal, and is therefore barred by the statute (Gen. Laws, c. 266, § 10), cannot be sustained. The statute cited does not apply to cases of unliquidated damages, like the present case, even though the statute on which it is founded may be in some respects penal. It applies to cases where the amount of the penalty is fixed in the statute.

Case discharged.[21]

Allen, J., did not sit; the others concurred.

KELLY v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, 1907. 125 Ky. 1, 100 S. W. 239, 30 Ky. Law Rep. 1062.)

Appeal from Caldwell Circuit Court. J. F. Gordon, Circuit Judge. Judgment for defendant. Plaintiff appeals. Affirmed.

Lassing, J. Ernest Kelly, a negro boy, 16 or more years of age, was injured while employed as a switchman in the yards of appellee company at Princeton, Ky. Appellant, Ira Kelly, filed suit against appellee in the Caldwell circuit court, seeking to recover damages for the loss of service and expenses incurred in nursing Ernest Kelly after his injury. He alleged that Ernest Kelly was his son, that he was wrongfully employed by appellant in a dangerous and hazardous work, and that by the negligence of appellee while so employed he was seriously and permanently injured. Appellee answered, traversing all of the material allegations of the petition, and thereupon appellant filed an amended petition, in which he stated that Ernest Kelly was not his son, but that he (appellant) stood in loco parentis to him. To this petition as amended appellee demurred, the demurrer was sustained, appellant declined to plead further, and his petition was dismissed. Because of this ruling on the part of the trial court, he prosecutes this appeal.

The question for determination is: Does the petition state a cause of action? There is nothing in the record showing that Ernest Kelly is in any way related to appellant. He alleges that he is not the father of the boy, but that he stands in loco parentis to him. It is not alleged that appellant ever adopted the boy, as he might have done by complying with the requirements of sections 2071 and 2072 of the

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[21] Accord: Wessel v. Gerken, 36 Misc. Rep. 221, 73 N. Y. Supp. 192 (1901); Eickhoff v. Sedalia, 106 Mo. App. 541, 80 S. W. 966 (1904).

Kentucky Statutes of 1903. Nor is it shown that he ever qualified as guardian. His right, therefore, to bring this suit, rests solely upon the fact that he took Ernest Kelly into his home when he was a very small boy, and has kept him there since. Did this fact impose upon appellant any legal obligation to continue to maintain and support Ernest Kelly? Or, was Ernest Kelly under any legal obligation to continue to remain with and give his services to appellant? Or, had he desired at any time to leave the home and service of appellant, could appellant, by any process of law, have compelled him to return to his home and continue in his service? The answer to these two questions must determine appellant's right to prosecute this suit. If he was under any legal obligation or responsibility to support the boy, or the boy was under any legal obligation to remain with and continue to render service to appellant, then appellant would certainly have the right to recover such damages as he has sustained because of his being deprived of this service. And, on the other hand, if he was not entitled in law to compel the boy to continue to render service to him and remain with him during his minority, then he is not entitled to maintain this suit. The right to recover for loss of service is based primarily and solely upon the right of the complainant to receive this service. This court has held, in a number of cases, that the father may recover for the loss of service of his child, and that, if the father be dead, the guardian may recover therefor, and that, if there be no guardian, then the mother may recover. But we have been unable to find any authority which would authorize one occupying a position similar to that occupied by appellant in this case to prosecute a suit for loss of service. He might, with propriety, have instituted a suit as next friend, but this would not have been for loss of service, but for the personal injury to the boy, and the recovery would be for the benefit of the boy, and not for the benefit of appellant. The relationship existing between appellant and the boy was not such as imposed any legal duty or obligation upon either to continue that relationship. It is true that the boy may have been under a moral obligation or duty to render to appellant service as a reward for the kindness extended to him in his earlier life; but this duty, if he owed such, was not one which appellant could have enforced.

We are therefore of opinion that appellant failed to show that he had a right to maintain this suit, and the judgment is affirmed.

SECTION 4.—EMANCIPATION

ABBOTT v. CONVERSE.

(Supreme Judicial Court of Massachusetts, 1862. 4 Allen, 530.)

Contract brought by a minor to recover the value of her services for five years, while in the employment of the defendant.

At the trial in the superior court, before Vose, J., there was evidence tending to show that in 1855, within a month before the services in question began, and when the plaintiff was thirteen years old, her father told her that she was old enough to earn her own living, and he would give her time to her, and she might have what wages she could earn. After this time, her mother was sick for several weeks, during which time the plaintiff did not leave her father's family, and there was no evidence to show that she did anything towards her own support. The plaintiff testified that afterwards the defendant came to the house where she was, and told her to go and live with him and he would do well by her; that she objected, and her grandmother told her she must go, and she went and remained in his family performing services for five years. There was also evidence tending to show that within two weeks after the plaintiff went to the defendant's house her father made a verbal contract with the defendant that the latter should keep her in his family till she was eighteen years old, treating her as one of the family, and no compensation for her services was reserved in the contract; and that, on one or more occasions, she expressed a wish or intention to leave the defendant's service, and that he induced her to remain by promises "to do well by her, or give her a good setting out, or remunerate her for her services."

There was also conflicting evidence in the case as to whether the defendant's treatment of the plaintiff was such as would be a fulfillment of his contract with her father; whether the plaintiff when she first entered the defendant's service informed him that her father had given her time to her; whether the defendant at a subsequent time informed her that if she did not do well he was under no obligations to keep her, and that there was no contract; and whether at another time when she proposed to leave his family he told her that she could not go, and that he had writings which would hold her. The defendant testified that he had not seen her father since the time when the contract with her was made, and the plaintiff testified that she did not know where he lived; and it appeared that in 1855 he removed from the place where he had until then lived.

The plaintiff asked the court to instruct the jury that if she had been emancipated by her father, and afterwards performed labor and services for the defendant without any knowledge of a contract between her father and the defendant, she was entitled to recover the value thereof; that the verbal contract for her services, even if she had not been emancipated, was not binding upon either party to it, and if, on her proposing to leave the defendant's service, he induced her to remain by promises of remuneration, or by stating that he had writings which would hold her, he would be liable to her for the value of her services from the time of making such promise or statement; that if he at any time induced her to enter or remain in his service by promising that he would do well by her if she would do so, he would be liable to her for the value of her services from the time of making such promise; that if, after her time was given to her by her father, she entered into the defendant's service at his request, she was entitled to recover of him the value of her services, even though he afterwards made a contract with her father for her services; and that the verbal contract between her father and the defendant being void, if the defendant had not fully executed it, she was entitled to recover the value of her services, if the jury were satisfied that her father abandoned all care of her from the time she entered the defendant's service.

The judge declined to make any of the rulings asked for, and instructed the jury that if the plaintiff's father told her she might have her own time and earn her living, he had a right to revoke the license at any time before she availed herself of it or acted upon it; and if, while she remained in his family, and before she had acted upon that license, he placed her in the care of the defendant, on the terms represented by the latter, although without express notice to her, and she then went into the defendant's family, this would be such a revocation, and his usual legal control over her and her service would continue, subject to his agreement with the defendant; that it was important for the jury to determine whether she went into the defendant's family voluntarily, or by compulsion of her friends, before the contract, if any, was made between him and her father; and if she went by compulsion of her friends, and not voluntarily, in pursuance of some contract between herself and the defendant, it would not be such an acting upon the emancipation as would prevent a revocation thereof by her father, and she would not be entitled to recover, if he made the contract with the defendant which it was alleged he made; that if she went into the defendant's service under a contract between her father and the defendant, a subsequent promise by the latter to pay her for her services or to do well by her, or a failure by him to fulfil the contract with her father in some particulars, would not entitle her to recover in this action.

The jury returned a verdict for the defendant, and, in reply to two questions specially submitted to them, found that the plaintiff did not voluntarily enter into the service of the defendant, and that he induced her to remain in his service by promising to do well by her, or to give her a good setting out, or to remunerate her for her services. The plaintiff alleged exceptions.

CHAPMAN, J. The English books furnish very little light on the subject of the emancipation of minor children by their father. In this country, there have been judicial decisions in respect to it, in several states. The most important cases are those cited by counsel in this case, and others referred to in Reeve's Domestic Relations (3d Ed.) 291, note. These cases establish the doctrine that a father may emancipate his child for the whole remaining period of minority, or for a shorter term; that the emancipation may be by an instrument in writing, by verbal agreement or license, or by implication from his conduct; and that the emancipation is valid against creditors, and to some extent against the father. The present case raises a question as to the right of the father to revoke such emancipation. On this question we do not find any judicial decision. In Kauffelt v. Moderwell, 21 Pa. 222, there is a dictum that "the private arrangement between the father and son is revocable at the father's pleasure"; but this cannot be true as a general proposition.

The basis of the father's right to the services of his children is his duty to support and educate them. But this duty is subject to many modifications growing out of the circumstances and conduct of the parties, and the right is not absolute or inalienable. It may be forfeited by misconduct, but cases may arise where the forfeiture would be held to be temporary. The cases referred to establish the doctrine that it may be transferred to the minor. It is to be regarded as being in the nature of property; and as a minor may hold other property independently of his father, there seems to be no valid reason why he may not thus hold the right to his own time and earnings. As he may hold it by a contract with his father under seal, or for a valuable consideration, there is no more reason for holding that the father may revoke this contract, at his pleasure, than any other contract. On principle, he should be as fully bound by it as by a conveyance of land or other property to his child. As it may be held by gift or license without any consideration, there is no reason why the gift, when accepted, should be any more revocable, without the consent of the donee, than other gifts. But a gift is not binding on the donor until it is accepted; and the acceptance of a gift of this character must be by acting upon it. Until it is acted upon, it must, from the nature of the case, be revocable.

The present action is brought on the assumption that the plaintiff has been emancipated by her father's parol agreement, without consideration; and the court are of opinion that the jury were rightly instructed that it was revocable at any time before the plaintiff had availed herself of it, or acted upon it. If her services were rendered to the defendant under a contract made with her father, he only can bring an action to recover the amount due for them, and this action cannot be maintained.

Exceptions overruled.[22]

SMITH v. GILBERT.

(Supreme Court of Arkansas, 1906. 80 Ark. 525, 98 S. W. 115, 8 L. R. A. [N. S.] 1098.)

Appeal from Circuit Court, Sevier County; James S. Steel, Judge.

Action by C. N. Smith against Dan Gilbert. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McCulloch, J.[23] This is an action brought by appellant, C. N. Smith, to recover from appellee, Dan Gilbert, the value of the services of his (appellant's) son, who was a minor, and also damages sustained on account of appellee having enticed the boy away from his parent. It is alleged in the complaint that the defendant wrongfully enticed the minor son of the plaintiff away from home, and employed him for a period of six months without the plaintiff's consent, and over his written objection. It is undisputed that the defendant hired plaintiff's son, without the consent of the parent, and retained the son in his employment for a period of six months at wages of $10 per month which he paid to the boy, and that a few days after defendant hired the boy the plaintiff sent him written notice in the following words: "You are hereby warned not to employ my son, Tommie. If you do, I will hold you responsible." The boy testified that his father drove him away from home and told him not to return. This was denied by the plaintiff in his testimony. They both testified that before the boy left home, his father offered to furnish him land and a mule and give him for his services one-half of all the crop he raised.

The court, at the request of defendant's counsel, gave to the jury the following instructions over plaintiff's objections: "(1) The court instructs the jury that if they believe from the evidence in this case that the plaintiff, C. N. Smith, ordered his son, T. P. Smith, to leave home, and told him that he must get another home, your verdict will be 'we, the jury, find for the defendant.' (2) The court instructs the jury that if they believe from the evidence that C. N. Smith, the plaintiff, had at any time before Daniel Gilbert hired the son, T. P. Smith, set him free, or by making a deal that he, the said T. P. Smith, was to make a share crop, your verdict will be, 'we, the jury, find for the defendant.' * * *"

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[22] Where parol emancipation without consideration has been acted upon, it was held irrevocable in the following cases: Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73 (1827); Torrens v. Campbell, 74 Pa. 470 (1873); Campbell v. Campbell, 11 N. J. Eq. 268 (1856).

[23] Part of the opinion is omitted.

The first instruction quoted above is said to be incorrect, for the reason that it entirely ignores the plaintiff's revocation of his command to his son to leave home, and his implied consent that the defendant might hire the boy. There seems to be some conflict in the authorities as to the right of a parent to revoke the manumission of his child when once made, but there can be no doubt upon the proposition that where the parent has compelled his child to leave home and seek temporary employment elsewhere for a reasonable length of time, it operates as an act of manumission for the time, and cannot be revoked by the parent so as to abrogate a contract for service fairly entered into between the emancipated child and his employer. Such contracts made after the act of emancipation, and before the revocation, cannot be thus disturbed by the parent. It was therefore not erroneous to give the instruction in question.[24]

[On other grounds the case was] reversed and remanded for a new trial.

GERINGER v. HEINLEIN.

(Court of Common Pleas, Hamilton County, Ohio, 1893. 6 Ohio Dec. 26.)

Plaintiff, as a judgment creditor of John Heinlein for $456, on a debt five or six years old, seeks to subject real estate in his wife's name as having been purchased with the husband's money.

The couple are old and have been married nearly forty years. John Heinlein is a butcher by trade. In years gone by he brought his wages home, but ten years ago he started a meat shop in which he incurred the debt to the plaintiff and for ten years has not brought enough home to pay for his own support.

The father seems shiftless and infirm, but the mother and children are evidently energetic and capable, and the latter, while under age earned excellent wages, which they brought to their mother, and out of that fund she has supported them all and in 1884 she began saving in a building association, and in 1888 had enough to make a first payment on a favorable purchase of a home negotiated by a son-in-law in her name, and the children's earnings have kept up the payments.

The father has taken no part in the management of the house nor in his children getting occupation; they have done all that independently of him. He did not seem to know how much they earned, and though he knew something was put in the building society, he did no know in what one nor how much, nor that a home was bought until they moved him along with the other furniture and ornaments into it.

[24] See, also, Farrell v. Farrell, 3 Houst. (Del.) 633 (1867).

A fortiori, when the parent deserts the child, there is an emancipation, at least during the time of desertion. Clay v. Shirley, 65 N. H. 644, 23 Atl. 521 (1874); The Etna, 1 Ware (2d Ed.) 474, Fed. Cas. No. 4,542 (1838); Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161 (1905); Thompson v. Chicago, M. & St. P. Ry. Co. (C. C.) 104 Fed. 845 (1900).

The manner of both the old people perfectly corroborates their statements, and with the other evidence carries conviction that the above account is substantially accurate. It is claimed that the mother admitted she was merely treasurer for the family. This is a mistake; she was asked several times if she was treasurer, and each time answered "Yah! yah!" not knowing the import of the question.

Plaintiff claims that the property bought with the earnings of minor children belongs to the father, and is liable for his debts.

BATES, J. Though the law of this case is not in doubt, it is formulated here merely to save up and give others the benefit of the authorities accumulated in the examination.

The right of a father to the service and earnings of minor children arises out of his obligation to support and educate them as an incident to that duty. The right and the duty are reciprocal and compensatory.

The father's right is not a property right, for if he dies it ends; if he goes into bankruptcy his creditors do not get it. The child is not a slave, nor a chattel, nor an asset. The natural right of a human being to possess his own earnings is limited by the municipal law governing this domestic and personal relation, and the parent can, at will, remit the child to his natural rights earlier than the law alone would. The right is not for the parent's profit alone, but for the child's advantage also, and he can consult the child's capacity, inclination, disposition, etc., and stimulate his industry or ambition by the incentive of possessing the fruits of his own labor, and is not obliged to compel him to work or hire him out for the benefit of creditors.

1. Hence it follows that the father's freedom in this matter cannot be interfered with by creditors. The relinquishment by the parent to the child of the right to the future products of his industry, does not withdraw from the parent's creditors any fund on which they have a claim, and such an emancipation by an insolvent parent is as valid as if he were out of debt (Reeve, Dom. Rel., to the contrary notwithstanding), even though insolvency was the motive.[25] Donegan v. Davis, 66 Ala. 362; Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386; Wolcott v. Rickey, 22 Iowa, 171; Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117; Lord v. Poor, 23 Me. 569; Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207; Dick v. Grissom, Freem. Ch. (Miss.) 428; Dierker v. Hess, 54 Mo. 246; Clemens v. Brillhart, 17 Neb. 335, 22 N. W. 779; Shortel v. Young, 23 Neb. 408, 36 N. W. 572; Johnson v. Silsbee, 49 N. H. 543; McCloskey v. Cyphert, 27 Pa. 220; Chase v. Smith, 5 Vt. 556; Bray v. Wheeler, 29 Vt. 514; Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478; Wambold v. Vick, 50 Wis. 456, 7 N. W. 438.

[25] Accord: Partridge v. Arnold, 73 Ill. 600 (1874); Trapnell v. Conklyn, 37 W. Va. 242, 253, 16 S. E. 570, 38 Am. St. Rep. 30 (1892); Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115 (1878); Merrill v. Hussey, 101 Me. 439, 64 Atl. 819 (1906).

2. Emancipation may be verbal as well as written, and may be implied as well as express, and may take a variety of forms or be inferred under any diversity of circumstances which recognizes the child as a person sui juris. Thus, sending him forth to shift for himself, or compelling him to support himself shows emancipation, as in Farrell v. Farrell, 3 Houst. (Del.) 633; Armstrong v. McDonald, 10 Barb. (N. Y.) 300; Canovar v. Cooper, 3 Barb. (N. Y.) 115; Dick v. Grissom, Freem. Ch. (Miss.) 428; Nightingale v. Withington, 15 Mass. 272, 274, 8 Am. Dec. 101. Or deserting his wife and children. Wells v. Kennebunk, 8 Me. 202; Clay v. Shirley, 65 N. H. 644, 23 Atl. 521; Atwood v. Holcomb, 39 Conn. 270, 274, 12 Am. Rep. 386. Allowing a son to become a partner in a business is a release of his services. Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478. Or employing a son, agreeing to pay him certain wages or salary. Beaver v. Bare, 104 Pa. 58, 49 Am. Rep. 567; Clemens v. Brillhart, 17 Neb. 335, 22 N. W. 779. Allowing him to do business on his own account tends to show the same. Lackman v. Wood, 25 Cal. 147; Wolcott v. Rickey, 22 Iowa, 171; Dierker v. Hess, 54 Mo. 246.

Among the known and established incidents which will warrant the court or jury to infer emancipation, seems to be the fact that the minor makes his own contract for his services on his own account and for his own benefit.[26] Here the failure of a father to make an objection is an implied assent that the minor shall have his own earnings; and this principle settles our case. Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207; Donegan v. Davis, 66 Ala. 362; Dierker v. Hess, 54 Mo. 246. In these cases a creditor sought to reach the son's savings. In the following cases either the son or the father was suing the employer for the son's wages, and the same doctrine was announced: Haugh, etc., Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Snediker v. Everingham, 27 N. J. Law, 143, 148; Cloud v. Hamilton, 11 Humph. (Tenn.) 104, 53 Am. Dec. 778; Chase v. Smith, 5 Vt. 556; Armstrong v. McDonald, 10 Barb. (N. Y.) 300; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; Canavar v. Cooper, 3 Barb. (N. Y.) 115. And see Farrell v. Farrell, 3 Houst. (Del.) 633, 640.

4. An emancipation of the child is not the less effectual because he remains under his father's roof. He need not leave home. A disruption of the family is not necessary. The failure to turn each other out of doors does not render the mutual renunciation any less effectual. All other families may remain the same. Donegan v. Davis, 66 Ala. 362 (where he paid board to the parents); Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117 (where he works the farm on which the family lived); Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec.

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[26] Accord: Burdsall v. Waggoner, 4 Colo. 261 (1878); Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411 (1907); Merrill v. Hussey, 101 Me. 439, 64 Atl. 819 (1906); Vance v. Calhoun, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111 (1905).

207 (where he boarded at home); Dierker v. Hess, 54 Mo. 246 (where he lived in his father's house without paying board); Shortel v. Young, 23 Neb. 408, 36 N. W. 572 (where he worked on his father's farm for wages); Johnson v. Silsbee, 49 N. H. 543 (where a daughter was her father's housekeeper, but he let her keep what she earned from sewing for others, and thus bought the machine levied on by his creditors); McCloskey v. Cyphert, 27 Pa. 220 (where he lived at home and supported his parents); Beaver v. Bare, 104 Pa. 58, 49 Am. Rep. 567 (where he lived at home and was apprenticed to his father's firm, which became insolvent); Penn v. Whitehead, 17 Grat. (Va.) 503, 94 Am. Dec. 478 (where he lived at home, but had his own business).

5. One or two cases deserve special mention from their similarity to the case at bar. In McCloskey v. Cyphert, 27 Pa. 220, a farm belonging to the father was sold at sheriff's sale; it was afterwards leased by the buyer to a minor son, who worked it, and thereby supported the whole family. The crop was held to be protected from levy by the father's creditors, an emancipation being implied. In Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117, a mother held land in trust for her children; the whole family lived on it and worked it for their own advantage; the crops were levied on by the creditors of the father; it was held that an agreement or understanding between the father and children, that the latter were working for themselves would be inferred. In Dierker v. Hess, 54 Mo. 246, a son lived at his father's house, and used his earnings to buy horses and hogs, which he let run with his father's animals and let his father use the horses. His father neither paid him wages, nor charged him board, but he paid the father for feed for the animals. An emancipation was implied as against a creditor who levied on the son's animals. In Shortel v. Young, 23 Neb. 408, 36 N. W. 572, the wife of an old and infirm man bought a farm, making the first payment from savings of a son, given to her, and told her other minor sons that if they would stay at home and work on the farm until it was paid for, she would convey a certain part to them, all of which was done, the father giving them their time. The father did chores about the place, and the sons stayed and worked off the mortgage, and the farm and crops were held not subject to the father's creditors.

There is no reason why the creditor should be favored by a strict finding against an emancipation. Taking away the children's earnings would tend to ruin them by breaking their courage, and by preventing effort would ultimately do creditors no good. If the father were dead or absent, there would then be no claim; and why should a heroic struggle to provide a home against adverse circumstances, one of which is the duty to protect an aged and infirm parent, be defeated by the very fidelity with which that duty is met.

WHITE v. HENRY.

(Supreme Judicial Court of Maine, 1845. 24 Me. 531.)

Assumpsit to recover the wages of a minor son of the plaintiff for the term of three months and twenty days, commencing on Oct. 28, 1843, as a seaman on board a vessel belonging to the defendants.

The services were performed, and the defendants proved payment therefor to the son, and contended that this was a discharge from the father.

The defendants at the time of making the contract, knew that the son was under age. The plaintiff did not know of the intention of the son to go to sea, nor of his having shipped until after he had sailed. The plaintiff had always supplied his son with the means of support so long as he would stay with him. The son was married in 1842, against his father's wishes, and without his consent, and contrary to his direction, having gone secretly into the State of Connecticut for that purpose, because his father would not permit him to marry here. The plaintiff has never expressly or impliedly given his assent to the marriage, but has always been ready and willing to support his son in a manner becoming his degree and station in life. The son, however, has declined to live with his father, and has lived with his wife, having no children, when not at sea.

If the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment was to be entered for the amount of the wages, at fourteen dollars per month; and if not, the plaintiff was to become nonsuit.

The opinion of the Court was drawn up by—

TENNEY, J. It is a general principle well settled, that parents are under obligation to support their minor children, and that they are entitled to their earnings. When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors; or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations.

The statute requires, that when a male, under the age of twenty-one years is to be married, the consent of the parent, guardian, or other person having the care or government of such party within the State, shall be obtained before marriage. Rev. St. c. 87, § 7. We cannot believe that the violation of an express provision of law, can secure to a minor, who is guilty thereof, a privilege, which he would not otherwise possess, and constitute another exception to the general law.

If the son is not entitled to his earnings, a payment to him of their value by his employer (without the consent of the father, express, or implied), knowing his minority, cannot deprive the father of the right to recover a just compensation for the labor, of which he has been deprived without his own fault or neglect.

The case at bar finds, that the son, whose wages are claimed in this action, refused to live with his father, who provided every thing necessary for his comfort and convenience. He went away without the knowledge, and married against the will and express direction, of his father. The father has in no way consented that he should have his earnings, but has always been ready and willing to support him in a manner becoming his degree and station in life. The defendants, knowing that he was a minor, without the knowledge or consent of his father, employed him as a seaman, and have paid him his wages in full.

To allow this defence to prevail would hold out encouragement to sons, impatient of parental control, while in their minority, to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraint; would offer inducements to youth to enter into improvident and ill advised marriages, which maturer years would cause them to regret and deplore.

It is insisted that the defendants were authorized to suppose, that the son's marriage was by the father's consent. The father could not be deprived of that, which was his own, when no negligence was imputable to him, and the defendants by the knowledge of the son's minority, could have informed themselves of the facts before they made payment to him.

Defendants to be defaulted, and judgment to be entered at the rate of $14 a month for the time the son was employed, and interest from the date of the writ.

ALDRICH v. BENNETT.

(Supreme Court of New Hampshire, 1885. 63 N. H. 415, 56 Am. Rep. 529.)

Case, for unlawfully enticing away the plaintiff's minor daughter, on the 29th day of March, 1879, and depriving him of her services from that time until the 8th day of September, 1882, when she became twenty-one years of age. The defendant pleaded that on said 29th day of March he was lawfully married to the daughter, and that the plaintiff was not thereafter entitled to her services. To this plea the plaintiff demurred.

CLARK, J. The right of a parent to the earnings of his minor child, upon whatever principle it is founded (Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288), is commensurate with the right of custody; and so long as the right to the services of the child remains, the right to control those services must exist. Whatever, therefore, operates as a release from parental control, necessarily terminates parental right of service; and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings.

The marriage of a female infant, if above the age of legal consent, is valid, although contracted and entered into in defiance of parental wishes and authority. Gen. Laws, 1878, c. 180, §§ 13, 14; Parton v. Hervey, 1 Gray (Mass.) 119. Being valid, the same legal consequences must follow from it, whether contracted in obedience to parental preferences, or in opposition to them. In either case the parent is no longer entitled to the services and earnings of the infant married daughter. The new relations created by the marriage, being inconsistent with the enforcement of parental rights, operate as an emancipation from them. The plaintiff's daughter, being above the statutory age of consent, had the legal capacity to form the relation of marriage, and although in strictness of law it should not be formed without parental consent, it is nevertheless sustained on grounds of public policy, and parental rights are made to yield to it. Cooley, Torts, 237. The legality of the marriage is admitted by the demurrer, and the plea is a sufficient answer to the plaintiff's action. Hervey v. Moseley, 7 Gray (Mass.) 479, 66 Am. Dec. 515.

Demurrer overruled.[27]

CARPENTER, J., did not sit: the others concurred.

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[27] In Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255 (1892), an instruction was sustained to the effect that the minor child after marriage would be entitled as of right to such portion of his wages as would enable him to support his wife, and that the father could only claim the rest.

So, in State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899), it was held that the voidable, but not void, marriage of a thirteen year old daughter without her parent's consent, deprived her father of all right of her control or custody if she elected to live with her husband.

NOTE ON THE EFFECT OF THE MINOR SUING FOR TORT TO HIMSELF BY HIS PARENT (WHO IS ENTITLED TO HIS EARNINGS AND SERVICES) AS NEXT FRIEND OR GUARDIAN.—Under such circumstances it is not error to allow the infant to recover for loss of earnings during minority: (a) When the damages to the minor by reason of loss of earnings during minority are set forth in the petition. Abeles v. Bransfield, 19 Kan. 16 (1877). (b) When the next friend or guardian testifies on the trial as a basis for the recovery of such damages for loss of earnings by the minor. Chesapeake & O. Ry. Co. v. Davis, 119 Ky. 641, 60 S. W. 14 (1900); Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486 (1904). In Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386 (1906), the action by the next friend was not inconsistent with his claim for damages to his right as a parent. (c) When the next friend or guardian of the minor procures an instruction to be given that the infant is entitled to damages by reason of loss of earnings during his minority. American Car Co. v. Hill, 226 Ill. 227, 80 N. E. 784 (1907).

It seems, however, that the mere commencement of the suit of the minor

CHAPTER IV

PARENT'S LIABILITY IN TORT TO CHILD, AND VICE VERSA—LIABILITY OF PARENT FOR THE TORT OF THE CHILD

ROLLER v. ROLLER.

(Supreme Court of Washington, 1905. 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893, 107 Am. St. Rep. 805.)

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Action by Lulu Roller, by E. C. Million, her guardian ad litem, against E. W. Roller. From a judgment for plaintiff, defendant appeals. Reversed.

DUNBAR, J. The defendant was convicted of the crime of rape, committed upon his minor daughter, Lulu Roller, and was sentenced to a term in the penitentiary at Walla Walla.[1] This action was commenced by the said Lulu Roller for the purpose of recovering from said defendant damages for said rape in the sum of $2,000, and the homestead of the defendant, upon which the minor children of the defendant were residing, was attached. The said Lulu Roller at the time of the commencement of this action was 15 years old. The homestead in dispute was the community property of Roller and his deceased wife, Emma Roller. The defendant interposed a demurrer to the complaint of the plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action, in that the plaintiff, being the minor child of defendant, living with him and unemancipated, had no right to sue for a tort committed by the parent upon the child. Motion was made to discharge the attachment (1) because the land was the homestead, exempt under the state law, and (2) because the land was exempt under the federal statute which exempts such property from debts contracted before the issuance of the patent. The motion to discharge the attachment was overruled.

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by its parent as next friend or guardian, does not waive the parent's right to a suit in his own name for loss of the child's services during his minority. Slaughter v. Nashville, C. & St. L. Ry. Co. (Ky.) 90 S. W. 243 (1906), rehearing denied 91 S. W. 713 (1906). Especially where the next friend as parent had already recovered judgment. Texas & Pac. Ry. v. Morin, 66 Tex. 225, 18 S. W. 503 (1886).

[1] The parent's criminal liability for excessive violence to the child is clear. Hornbeck v. State, 16 Ind. App. 484, 45 N. E. 620 (1896); Commonwealth v. Blaker, 1 Brewst. (Pa.) 311 (1867).

Upon the trial of the cause, judgment was entered in favor of the plaintiff for the sum of $2,000.

It is assigned that the court erred in overruling the demurrer of the appellant to the amended complaint of the respondent, and in overruling the motion to dissolve the attachment. It is the contention of the appellant that a minor child cannot sue a parent for damages arising upon tort; that such actions are against public policy, and not permitted by the law. The rule of law prohibiting suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.

This view, in effect, is not disputed by the respondent, who admits the general proposition that the domestic relations of the home and family fireside cannot be disturbed by the members thereof by litigation prosecuted against each other for injuries, real or imaginary, arising out of these relations; but he asserts that the law has well-defined limitations, and that every rule of law is founded upon some good reason, and the object and purpose intended to be attained must be looked to as a fair test of its scope and limitations; that in the case at bar the family relations have already been disturbed, and that by action of the father the minor child has in reality been emancipated; that the harmonious relations existing have been disturbed in so rude a manner that they never can be again adjusted, and that therefore the reason for the rule does not apply.

There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree. Hence all the disturbing confusion would be introduced which can be imagined under a system which would allow parents and children to be involved in litigation of this kind.

Outside of these reasons, which affect public policy, another reason, which seems almost to be reductio ad absurdum, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him. In addition to this, the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one.

At common law it is well established that a minor child cannot sue a parent for a tort. It is said by Cooley on Torts, p. 276, under title of "Wrongs to a Child": "For an injury suffered by the child in that relation, no action will lie at the common law." And this has been held to be analogous to coverture, where a husband or wife is forbidden to sue the other spouse for torts or wrongs committed upon them to their damage during coverture, even refusing the action after the relation, by a divorce, has ceased to exist. See Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27, which is simply an expression of the universal law on that subject. See, also, Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550.

Mr. Schouler, in his work on Domestic Relations, § 275, after discussing the proposition of filial relations, says: "With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offense, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation."

The text in this case goes beyond the circumstances of the case at bar, where the action was brought during the minority of the plaintiff. As will be seen by the extract above quoted, it is even forbidden after the child becomes of age, if the injury sued upon is referable to the period of minority. So well is this principle of the law understood that there have been very few attempts to inaugurate actions of this kind. The only one to which we are referred by brief of counsel, of which we have been able by independent investigation to discover, which seems to be in point, is Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682, where it was held that a parent is not civilly liable to a child for personal injuries inflicted during minority, and where the relation of parent and child, with its mutual obligations, exists. This was an action by the daughter against the mother for wrongful incarceration in an insane asylum, and was brought after the marriage of the daughter, who, at the time of the alleged injuries, was separated and living away from her husband—a much stronger case, it will be seen, in favor of entertaining an action, than the one at bar, so far as the relations of the parties were concerned. The court, in refusing the remedy, said:

"The peace of society, and of the families composing society, and a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

There being no authority at common law for such an action, and it not being claimed that there is any statutory provision for an action of this kind, we are of the opinion that the action should not have been entertained, and that the demurrer to the complaint should have been sustained. This conclusion renders unnecessary a discussion of the other questions involved.

The judgment is therefore reversed, with instructions to the lower court to sustain the demurrer to the complaint.[2]

Mount, C. J., and Hadley and Fullerton, JJ., concur.

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[2] Accord: McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787 (1903). But see Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903).

Observe, however, that if, at the time the parent's action toward the child has been committed, the child has been fully emancipated from the parent's control, the child can recover. Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908), semble.

Note on Liability of Parent to Third Persons for the Tort of the Child.—The parent is under no liability. Wilson v. Garrard, 59 Ill. 51 (1871); Paulin v. Howser, 63 Ill. 312 (1872); Malmberg v. Bartos, 83 Ill. App. 481 (1898); Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228 (1908); Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101 (1885); Baker v. Morris, 33 Kan. 580, 7 Pac. 267 (1885); Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737 (1891); Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336 (1880); Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430 (1857); Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381 (1868); Tifft v. Tifft, 4 Denio (N. Y.) 175 (1847); Schlossberg v. Lahr, 60 How. Prac. (N. Y.) 450 (1881); Chandler v. Deaton, 37 Tex. 406 (1872); Ritter v. Thibodeaux (Tex. Civ. App.) 41 S. W. 492 (1897); Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325 (1899); Taylor v. Seil, 120 Wis. 32, 97 N. W. 498 (1903); Chastain v. Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958 (1904); Mirick v. Suchy, 74 Kan. 715, 87 Pac. 1141 (1906). But the parent may be liable as a joint tort-feasor with the child. Hoverson v. Noker, 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381 (1884). Or because of negligence in allowing the child to handle a dangerous instrument under such circumstances that the damage to a third person may be the proximate result of the act of the parent. Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789, 96 Am. St. Rep. 475 (1901); Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795 (1898); Palm v. Ivorson, 117 Ill. App. 535 (1905). Or where the child is the actual servant of the parent acting in the scope of his authority. File v. Unger, 27 Ont. App. 468 (1900).

Note on Various Permissible and Prima Facie Inferences of Fact Which Arise from the Existence of the Relation of Parent and Child.—(1) Parent's support of child gratuitous: The parent, actually furnishing the child with necessary support and maintenance, is denied any right to charge the child for necessaries so furnished. It is immaterial whether the child is a minor and emancipated, or an adult. Terry v. Warder, 78 S. W. 154, 25 Ky. Law Rep. 1486 (1904). The same holding occurs where the child is a stepchild, or where the adult furnishing necessaries has assumed a position in loco

parentis toward the child. Dixon v. Hosick, 101 Ky. 231, 41 S. W. 282 (1897); Smith v. Rogers, 24 Kan. 140, 36 Am. Rep. 254 (1880); Kempson v. Goss, 69 Ark. 451, 64 S. W. 224 (1901); Livingston v. Hammond, 162 Mass. 375, 38 N. E. 968 (1894). But see Eiken v. Eiken, 79 Minn. 360, 82 N. W. 667 (1900).

(2) Child's support of parent prima facie gratuitous: In re Skelly's Estate, 18 Misc. Rep. 719, 43 N. Y. Supp. 964 (1896); Niehaus v. Cooper, 22 Ind. App. 610, 52 N. E. 761 (1899); Lawrence v. Bailey, 84 Mo. App. 107 (1900); Borum v. Bell, 132 Ala. 85, 31 South. 454 (1902); Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669 (1902), rehearing denied 42 S. E. 866 (1902); In re Prizer's Estate, 12 Montg. Co. Law Rep. (Pa.) 186 (1896); Harris v. Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815 (1899). But see Bell v. Rice, 50 Neb. 547, 70 N. W. 25 (1897).

(3) Inference of gift to child: So, where property is paid for by the parent, but a conveyance is taken in the name of the child, there is a prima facie inference of a gift to the child, and no trust results to the parent who pays the consideration. Euans v. Curtis, 190 Ill. 197, 60 N. E. 56 (1901); Kern v. Howell, 180 Pa. 315, 36 Atl. 872, 57 Am. St. Rep. 641 (1897); Rhea v. Bagley, 63 Ark. 374, 38 S. W. 1039, 36 L. R. A. 86 (1897).

(4) Services rendered by adult or emancipated child to parent, and vice versa, are gratuitous, in the absence of an express contract between the parent and child. Munger v. Munger, 33 N. H. 581 (1856); Putnam v. Town, 34 Vt. 429 (1861); Hall v. Hall, 44 N. H. 293 (1862); Schwachtgen v. Schwachtgen, 65 Ill. App. 127 (1895); Wamsley v. Wamsley, 48 App. Div. 330, 62 N. Y. Supp. 954 (1900); Williams v. Resener, 25 Ind. App. 132, 56 N. E. 857 (1900); In re Dettenmaier's Estate, 13 Pa. Super. Ct. 170 (1900); Williams v. Halford, 73 S. C. 119, 53 S. E. 88 (1905); Avitt v. Smith, 120 N. C. 392, 27 S. E. 91 (1897); Bell v. Rice, 50 Neb. 547, 70 N. W. 25 (1897); Kloke v. Martin, 55 Neb. 554, 76 N. W. 168 (1898); McDaniel v. Parish, 4 App. D. C. 213 (1894); Jessup v. Jessup, 17 Ind. App. 177, 46 N. E. 550 (1897); Jackson's Adm'r v. Jackson, 96 Va. 165, 31 S. E. 78 (1898); Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841 (1900); Enger v. Lofland, 100 Iowa, 303, 69 N. W. 526 (1896). The same holding occurs where one party stands in loco parentis to the other. Garcia v. Candelaria, 9 N. M. 374, 54 Pac. 342 (1898).

Note on Illegitimates.—At common law the illegitimate child is filius nullius. He could inherit from nobody, and none but his legitimate issue could inherit from him. This was not cured by general statutes of descent and distribution, for these were, by the construction placed upon them, held to apply only to legitimates. Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326 (1826). Hence the existence of statutes, now general, which specially regulate descent to and from illegitimates, and for the most part allow them to inherit from the mother, and the mother to inherit from them, in case of the death of the illegitimate without issue. 1 Stimson, Am. St. §§ 3151–3155.

The bastard's father is liable for its support only by statute, and that liability can be enforced only in the manner provided by statute. Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257 (1852); State v. Miller, 3 Pennewill (Del.) 518, 52 Atl. 262 (1902). In State v. Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854 (1903), and Marston v. Jenness, 11 N. H. 156 (1840), is considered the question of whether the proceeding by which the father is made liable for the support of the bastard is a civil or a criminal action.

At common law the bastard was not made legitimate by the subsequent marriage of his parents. This is now generally changed by statute. 1 Stimson, Am. St. § 6631; Monson v. Palmer, 8 Allen (Mass.) 551 (1864).

From the legal recognition of the relation of parent and child between the mother and her illegitimate child, which the statute regulating descent to and from bastards makes, it seems to have followed that the mother has a legal right to the custody of the child. Barnardo v. McHugh, L. R. [1891] App. 388; Perry v. State, 113 Ga. 936, 39 S. E. 315 (1901), by statute; Pratt v. Nitz, 48 Iowa, 33 (1878); Hesselman v. Haas, 71 N. J. Eq. 689, 64 Atl. 165 (1906).

Query: Whether the mother is under the same duty to support her illegitimate child that a father would be to support his legitimate child?

Query: As to mother's right to earnings and services of her minor illegitimate child till it reaches its majority?

The bastard still labors under a disadvantage by reason of the fact that, in the construction of statutes, children means primarily legitimates. Thus, in statutes giving an action for causing death to the deceased's administrator for the benefit of the deceased's "children," children does not include an illegitimate child. Dickinson v. North Eastern Ry. Co., 2 Hurl. & Colt. 735 (1863); Lynch v. Knoop, 118 La. 611, 43 South. 252 (1907). Contra: Galveston, H. & S. A. Ry. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S. W. 705 (1907).

For the construction of the word "children," "son," or "issue," in a will or settlement, as meaning primarily legitimate children, son, or issue, see Theobald on Wills (6th Ed.) p. 279.

Where a testator devised to his son in fee, with a gift over if the son "should die without an heir," and the son died leaving only a bastard child, who had been legitimated by an act which provided that the bastard "shall have and enjoy all the rights and privileges of a child born in lawful wedlock, and shall be able and capable in law to transmit any estate whatsoever as fully and effectually as if he had been born in lawful wedlock," the gift over did not take effect. McGunnigle v. McKee, 77 Pa. 81, 18 Am. Rep. 428 (1874).

So, where a testator devised to his daughter for life and then to her "lawful issue," and after his death the daughter's bastard child was legitimated under a similar statute, upon the death of the daughter leaving the legitimated child and other children born in lawful wedlock, the legitimated child was held to be entitled to share as one of the daughter's "lawful issue." Miller's Appeal, 52 Pa. 113 (1866).

The actual blood relationship between the bastard and its mother's and father's kin is so far recognized as to make the marriage of a bastard with her uncle by blood incestuous. Hains v. Jeffell, 1 Ld. Raym. 68 (1696); Clark v. State, 39 Tex. Cr. R. 179, 45 S. W. 576, 73 Am. St. Rep. 918 (1898); Brown v. State, 42 Fla. 184, 27 South. 869 (1900).

NOTE ON ADOPTION.—There can be no adoption, except as authorized by the Legislature. Matter of Thorne, 155 N. Y. 140, 49 N. E. 661 (1898); Now-she-po v. Wa-win-ta, 37 Or. 213, 62 Pac. 15, 82 Am. St. Rep. 749 (1900).

In Sullivan v. People, 224 Ill. 468, 79 N. E. 695 (1906), it was held that the rights of the parents cannot be precluded by adoption proceedings without being made parties by service of process. In 1907 the Illinois adoption act was amended to conform to the suggestions of the opinion of the court in this case, and to provide a mode of making parents defendants and serving them with process. Laws Ill. 1907, p. 3.

When the adopted child inherits from one of its adopting parents and then dies, the question arises whether descent from him as to this property shall be to the surviving adopting parent, or to the heirs by blood of the adopted child. This question is sometimes settled by the adoption statute itself in favor of the adopting parent. Swick v. Coleman, 218 Ill. 33, 75 N. E. 807 (1905). It has been held, however, that even when no provision is made by the actual words of the statute, yet the descent will be to the surviving adopting parent. Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788 (1884); Paul v. Davis, 100 Ind. 422 (1844).

Adoption acts generally provide that the adopted child shall be in the position of a child by birth so far as inheriting from the adopting parent is concerned.

This has a wide effect.

Of course, when the adopting parent dies intestate, the adopted child inherits as a child by birth. Burrage v. Briggs, 120 Mass. 103 (1876); In re Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146 (1888); Vidal v. Commagere, 13 La. Ann. 516 (1858).

If the adopting parent dies leaving a widow and an adopted child only, the adopted child, being entitled to take by inheritance like a child by birth, takes all the real estate and two-thirds of the personalty, and the widow can take no more than she could have taken had there been a child by birth. Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900); Buckley v. Frasier, 153 Mass. 525, 27 N. E. 768 (1891); Markover v. Krauss, 132 Ind. 294, 32 N. E. 1047, 17 L. R. A. 806 (1892); Moran v. Stewart, 122 Mo. 295, 26 S. W. 962 (1894); Atchison v. Atchison, 89 Ky. 488, 12 S. W. 942 (1890). Contra: Stanley v. Chandler, 53 Vt. 619 (1881). In Atchison v. Atchison, supra, the husband died testate and the widow renounced. The adopted child, therefore, could not say that he was entitled by descent to two-thirds. It was the residuary legatee who was claiming that the widow was entitled to one-third, because the adopted child was "issue" within the meaning of the statute fixing the amount which the widow was entitled to take. This position the court sustained.

Where a child is adopted after a will is made, and the will does not provide for it, the adopted child, being entitled to inherit like a child by birth, can, under statutes providing for the abatement of other legacies to make up a portion for a child by birth, have the same portion made up to him. Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201 (1902); In re Sandon's Will, 123 Wis. 603, 101 N. W. 1089 (1905).

Where a will is revoked by the birth of a child, or by marriage and birth of a child, or by the birth of a child alone, the adoption of a child is as effective as the acquisition of a child by birth. Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524 (1899); Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258 (1901). Contra: Davis v. Fogle, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485 (1890). In re Gregory's Estate, 15 Misc. Rep. 407, 37 N. Y. Supp. 925 (1868).

It seems to follow, from the fact that the adopted child has a right to inherit from the adopting parent, that the adopted child's children may also do so. Power v. Hafley, 85 Ky. 671, 4 S. W. 683 (1887); Pace v. Klink, 51 Ga. 220 (1874).

But the right to inherit from the adopting parent does not give the adopted child any right to inherit from the adopting parent's relatives directly or by representation. This is usually expressly provided for in adoption acts, but it is also the rule even where it is not expressly provided for. Keegan v. Geraghty, 101 Ill. 26 (1881); Sjoberg v. Field, 50 Misc. Rep. 412, 100 N. Y. Supp. 531 (1906); Moore v. Moore, 35 Vt. 98 (1862); Meader v. Archer, 65 N. H. 214, 23 Atl. 521 (1889); Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535 (1890); Estate of Sunderland, 60 Iowa, 732, 13 N. W. 655 (1883).

Where a deed or will makes a gift to the "lawful heirs of A." meaning those who inherit from A. on A.'s death, an adopted child is clearly included. Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 52 L. R. A. 75, 79 Am. St. Rep. 246 (1900); Johnson's Appeal, 88 Pa. 346 (1879). See, however, Reinders v. Koppelman, 94 Mo. 338, 7 S. W. 288 (1887); Morrison v. Session's Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500 (1888).

Even where the adoption act does no more than put the adopted child in the same place as a child by birth for purposes of inheritance, it has been held to be sufficient to cause the adopted child to fall within the meaning of the term "children" in a deed, will, or insurance policy executed or obtained by the adopting parent. Martin v. Ætna Life Ins. Co., 73 Me. 25 (1881); Virgin v. Warwick, 97 Me. 578, 55 Atl. 520 (1903). Von Beck v. Thomsen, 44 App. Div. 373, 60 N. Y. Supp. 1094 (1889), affirmed 167 N. Y. 601, 60 N. E. 1121 (1901). But see Russell v. Russell, 84 Ala. 48, 3 South. 900 (1887).

Where the adoption act does not do more than cause the adopted child to stand in the place of the child by birth for purposes of inheritance, the adopted child does not fall within the description of the term "child" or "bodily heirs," so as to take under a deed or will executed by one other than the adopting parent disposing of property to the adopting parent's "children" or "bodily heirs." Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289 (1901); In re Woodcock, 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291 (1907); Cochran v. Cochran, 43 Tex. Civ. App. 259, 95 S. W. 731 (1906); Schafer v. Eneu, 54 Pa. 304 (1867).

Where, however, the adoption act goes farther and provides, like the acts in force in Massachusetts before 1876 (Gen. St. Mass. 1860–72, c. 310), Rhode Island (Gen. Laws, R. I. c. 192, § 6), and Illinois (Rev. St. 1874, p. 128, § 5), that the child so adopted shall be deemed for the purpose of inheritance by such child, "and other legal consequences and incidents of the natural relation of parent and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock," the courts tend to recognize and give effect to the language by holding that even in a deed or will executed by a third party and containing a gift to the children of the adopting parent, an adopted child will fall within the meaning of the word "children" as so used, and will be entitled to take under the instrument. Sewall v. Roberts, 115 Mass. 262 (1894); Tirrell v. Bacon (C. C.) 3 Fed. 62 (1880); Hartwell v. Tefft, 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500 (1896); Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899). But see Jenkins v. Jenkins, 64 N. H. 407, 14 Atl. 557 (1887); Lichter v. Thiers, 139 Wis. 481, 121 N. W. 153 (1909).

Some statutes deal specifically with the capacity of the adopted child to take as the child of the adopting parent, when in a deed or will of a third party there is a limitation to the children or issue of the adopting parent. In re Leask, 197 N. Y. 193, 90 N. E. 652, 27 L. R. A. (N. S.) 1158 (1910) Wyeth v. Stone, 144 Mass. 441, 11 N. E. 729 (1887); Blodgett v. Stowell, 189 Mass. 142, 75 N. E. 138 (1905).

Under a statute which provided that "legitimate children" shall have the pauper settlement of the father, an adopted child took the pauper settlement of the adopting parent, because that was one of the "legal consequences" of being a child by birth. Washburn v. White, 140 Mass. 568, 5 N. E. 813 (1886); Waldoborough v. Friendship, 87 Me. 211, 32 Atl. 880 (1895), under a much more meager statute.

Where the statute provides that the adopted child shall stand in the same place as a child by birth for the purposes of inheritance only, the adopted child has been held not to be permitted to take a legacy to the adopting parent in case of lapse under a statute providing generally that, in case of a legacy to a parent and the lapse of that legacy, the legatee's children shall take the legacy in place of the legatee. Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753 (1898). Contra: Warren v. Prescott, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370 (1892).

Where the adopted child stands by virtue of the statute in place of a child by birth only for the purposes of inheritance, it is not exempt from the inheritance tax as a child by birth. Commonwealth v. Nancrede, 32 Pa. 389 (1859); Matter of Miller, 110 N. Y. 216, 18 N. E. 139 (1888).

Where a grandfather adopts a grandchild and dies intestate, it has been held that the grandchild inherits as child only, and not in the double capacity of child and grandchild. Morgan v. Rell, 213 Pa. 81, 62 Atl. 253 (1905); Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698 (1889). But see Wagner v. Varner, 50 Iowa, 532 (1879).

PART II

INFANTS

CHAPTER I

PERIOD OF INFANCY

ANONYMOUS.

(Court of Queen's Bench, 1704. 1 Salk. 44.)

It has been adjudged, that if one be born the first of February at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will, of lands, and dies, it is a good will, for he was then of age. Per HOLT, C. J.[1]

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[1] Accord: State v. Clarke, 3 Har. (Del.) 557 (1840); Ex parte Wood, 5 Cal. App. 471, 90 Pac. 961 (1907).

"In most states, except for marriage, a person, whether male or female, is deemed of age at twenty-one; and so where the laws are silent.

* * * * * * * * *

"But in many, a woman is of age at eighteen; a man, at twenty-one.

"And in several, a woman of any age, when lawfully married, may exercise all the powers of a married woman as if of full age. * * *

"And in several, all minors, male or female, attain their majority by marriage."

1 Stimson's "Amer. Statute Law, in Force January 1, 1886," § 6601.

For the provisions of statutes fixing the age at which persons may make wills, see 1 Stimson, Am. Stats. § 2602. Wills of personal property were permitted under the rules administered by the English ecclesiastical courts. These permitted wills of personalty to be made by males of 14 years and over and by females of 12 years and over. For the application of these rules in this country, see Davis v. Baugh, 1 Sneed (Tenn.) 477 (1853).

NOTE ON THE CAPACITY OF INFANTS TO DO VARIOUS ACTS.—(1) *For Capacity of Infant to Change His Domicile*, see Robertson v. Robertson, [1905] Vict. L. R. 546, and note thereon in 19 Harv. Law Rev. 215. (2) *Holding Public Office.*—Infants are incapable of holding public offices requiring a discretion, such as justice of the peace. Golding's Petition, 57 N. H. 147, 24 Am. Rep. 66 (1876). But he can hold office when only ministerial acts are required, as where he acts as special deputy sheriff. Moore v. Graves, 3 N. H. 408 (1826). Or appraiser of land to be sold on execution. White v. Laurel Land Co., 82 S. W. 571, 26 Ky. Law Rep. 775 (1904), rehearing denied 83 S. W. 628, 26 Ky. Law Rep. 1235 (1904). (3) Infants are capable of acting as agent, even for the sale of real estate. Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747 (1819). (4) *Infant as Trustee.*—Capacity to receive the title to property as a trustee and duty and power to discharge the trusts. Scot v. Haughton, 2 Vern. Ch. 560 (1706); Prouty v. Edgar, 6 Iowa, 353 (1858); United States Inv. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326 (1901); King v. Bellord, 1 Hem. & Mil. 343 (1863); Des Moines Ins. Co. v. McIntire, 99 Iowa, 50, 68 N. W. 565 (1896).

CHAPTER II

INFANTS' CONTRACTS AND CONVEYANCES[1]

SECTION 1.—HOW FAR ARE INFANTS' CONTRACTS ENFORCEABLE AGAINST THE INFANT BEFORE OR AFTER MAJORITY

I. General Rule of Non-Enforceability

WALLACE v. LEROY.

(Supreme Court of Appeals of West Virginia, 1905. 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.)

Poffenbarger, J.[2] This case is governed by legal principles applicable to contracts made by persons affected by the disability of infancy. Charles Leroy, an orphan boy, dependent upon his own resources for a living, owned and managed a cigar stand in the Florentine Hotel, at Huntington, W. Va., prior to May 29, 1902, and became indebted to a number of persons and firms for cigars, board, rent, and other things. Having become embarrassed, he gave his creditors worthless checks, moved part of his stock into the basement of an adjoining building, prepared to leave the city, and, on the day above named, sold all his stock of goods to A. A. Hanly, and departed. Geo. S. Wallace, an attorney to whom several claims against Leroy, amounting to nearly $300, had been delivered for collection, took assignments of them, and, on the day of the sale to Hanly, instituted an action against Leroy before a justice of the peace, in which an attachment was sued out, and copies thereof served on Hanly and other persons who were supposed to be indebted to the defendant, or to have property in their hands belonging to him. Hanly answered, admitting indebtedness on account of the purchase money of the property, amounting to $371.73. The defendant appeared by guardian ad litem, and set up his infancy, among other defenses. A jury was waived, and the justice rendered a judgment in favor of the plaintiff for $269.72, and ordered the garnishee to pay the same, together with the costs, out of the money so due from him. In a trial

[1] The law respecting contracts and conveyances of infants and insane persons will be found in Williston on Sales, §§ 28-41. This includes also the rules relating to the capacity of intoxicated persons to make bargains.

[2] Part of the opinion is omitted.

de novo by a jury in the circuit court on appeal, a demurrer to the evidence was sustained by the court, and a judgment of nihil capiat entered. * * *

The effect of the establishment of the fact of infancy depends upon the forum in which it is set up, the right in controversy, the time at which the benefit of it is claimed, and other conditions. Since the rules, principles, and processes of courts of equity are in many respects essentially different from those applied in courts of law, a party asserting rights to which he is entitled by reason of the disability of infancy may, in equity, be compelled to submit to conditions unknown to the common-law courts. As a condition of obtaining relief, he may be required to do equity, or to come into court with clean hands. For principles governing the procedure in equity in such cases, some of which are not applicable here—this being an action at law—see Mustard v. Wohlford's Heirs, 15 Grat. 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Grat. 857; Gillispie v. Bailey, 12 W. Va. 92, 29 Am. Rep. 445.[3]

Nor is this a possessory action by the infant to recover back specific property sold or bartered away by him. In such case he seeks to undo an executed contract, and to set up title to property; and many cases hold that he must return the money, or the property he received in exchange for it, if he is able to do so. 1 Min. Inst. 525; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Weed v. Beebe, 21 Vt. 495; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Boody v. McKenney, 23 Me. 517; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 737. What acts of disaffirmance would be sufficient to revest the title in him need not be indicated here.

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[3] See, also, Francis v. Felmit, 20 N. C. 637 (1839); Craighead v. Wells, 21 Mo. 404 (1855). A fortiori, the result is the same where the infant's defense is emphasized by a statutory enactment. Lamkin v. Ledoux, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104 (1906), post, p. 293. Or where the infant tenders back the consideration received. Hoyt v. Wilkinson, 57 Vt. 404 (1885). Or when the act of the adult is such that a tender would be useless. Star v. Watkins, 78 Neb. 610, 111 N. W. 363 (1907).

Observe that in Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209 (1879), it was held that, where the infant was sued in assumpsit to recover for goods sold and delivered, the plea of infancy was not a bar to the plaintiff's recovery, but he may recover to the extent of the benefit received by the defendant, not exceeding the price the defendant agreed to pay, although the goods purchased were not necessaries.

Where partners, one of whom is an infant, are sued for a partnership debt, the defense of infancy is valid so far as any personal liability of the infant partner is concerned. Folds v. Allardt, 35 Minn. 488. But all the partnership assets are liable for the partnership debt. Gay v. Johnson, 32 N. H. 167 (1855); Conary v. Sawyer, 92 Me. 463, 43 Atl. 27, 69 Am. St. Rep. 525 (1899); Pelletier v. Couture, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863 (1889).

Where the partnership can be sued as an entity, the judgment may run against the firm "other than the infant." Lovell v. Beauchamp, L. R. [1894] App. Cas. 607. Where the partners must still be sued individually as copartners, and an individual judgment rendered against each, it would seem that a judgment could be rendered against the adult partners only, but that execution must issue against all the assets of the partnership. See Whittimore v Elliott, 7 Hun (N. Y.) 518 (1876).

Many of the reported cases present instances of disaffirmance by infants after having attained their majorities, in which it is necessary to determine whether there has been a ratification. Aside from the question of ratification, this is important where the contract was one of sale of the infant's land, for it is said he cannot disaffirm such sale before he reaches maturity, since it requires as much discretion and judgment to rescind as to make a contract. 1 Min. Inst. 523. But he may have possession of the land against his contract while under age.

This is a mere personal contract whereby the infant has obligated himself to pay money, and which he repudiates while under age. Though executed on the part of the plaintiff's assignors, it is executory on his part. He is not seeking to recover either property or money, but simply defending against a demand for money. To avail himself of this defense, he need not return or offer to return what he has received. Weed v. Beebe, 21 Vt. 495; Fitts v. Hall, 9 N. H. 441; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Aldrich v. Grimes, 10 N. H. 194; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. However, the legal effect of the plea, sustained by proof, is to annul the contract, and revest in the assignors of plaintiff, as against the defendant, the title to the property they sold him. If he has any of it, they may recover it from him by any proper possessory remedy. 1 Min. Inst. 524; 16 Am. & Eng. Ency. Law, 294; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Nolan v. Jones, 53 Iowa, 387, 5 N. W. 572; Strain v. Wright, 7 Ga. 568; Brantley v. Wolf, 60 Miss. 420; Evans v. Morgan, 69 Miss. 328, 12 South. 270. This confers upon the party who made the sale to the infant a right to reclaim his property, which is essentially different from the right to recover damages for breach of a contract. There must be restoration, but not by tender or return of the property at or before pleading infancy against the money demand. It follows as a legal consequence, to be enforced by a separate, subsequent, appropriate proceeding.

The foregoing propositions are subject, however, to the qualification that infancy is no defense to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society. * * *

The application of these principles makes it impossible to sustain the view taken by counsel for the plaintiff in error as to any part of the demand, except the one for board. He is unable to establish a debt against the defendant. This is admitted. What its effect upon the title to the property in the hands of the purchaser from the defendant may be is a question not now presented for adjudication. This action is not to recover that property or its proceeds in the hands of the purchaser as the property of the plaintiff, but to obtain a personal judgment against the defendant, to the discharge and satisfaction of which the purchase money is sought to be appropriated by means of the garnishment, which is in the nature of an execution for the enforcement of satisfaction of a judgment out of the defendant's property. By his disaffirmance of the contract, the basis for a judgment against him has failed. What remains is a mere right to follow up property, which can no more constitute ground for a personal judgment than did the contract itself, after the defense of infancy had been made out. By allowing a personal judgment on that ground, the court would virtually make and enforce a new contract of sale between the parties. Escape from this logical result is attempted by saying the case is analogous to a proceeding against a nonresident, in which, although no personal judgment can be taken except upon appearance, the defendant's property may nevertheless be subjected to sale for satisfaction of the debt. But the cases cannot be assimilated. In an attachment against a nonresident proceeded against by order of publication, and not appearing, it must be shown, prima facie, that there is a debt due from the defendant to the plaintiff, and that the attached property belongs to the former. Both of these conditions are wanting in the case now under consideration.

Moreover, it was the right of action arising out of the contract, and no other, that the plaintiff acquired by the assignment. If the property obtained by the defendant under the contract still remained in his hands, it would be the subject of an independent action for its recovery; and, if any part of the proceeds of that property remaining in the hands of the garnishee can be recovered, it also gives rise to a cause of action distinct from, and independent of, that arising from the contract, to which the plaintiff had not shown himself entitled by any assignment. It is a right to follow up and reclaim the plaintiff's own property, not a right of action for damages consequent upon a breach of contract. What then in this case, except the claim for board, can afford a shadow of basis for recovery? Absolutely nothing. As there can be no judgment against the defendant, the attachment must wholly fail. There is nothing to be satisfied. There being no debt, there can be no attachment to seize and hold the property of the defendant to satisfy a debt.

Counsel for plaintiff in error rely upon Evans v. Morgan, 69 Miss. 328, 12 South. 270, to sustain their contention, but upon examination it is found to be exactly contrary thereto. An infant engaged in merchandising, became indebted, and then made a fraudulent sale of his stock of goods to his father. In an action at law he set up, and defeated his creditors by, his plea of infancy. They then brought a suit in equity to set aside the sale and subject the property to the payment of their debt. Although unable to identify their property, the court held that they were entitled to have satisfaction out of the proceeds of the property, because the proof showed that it had been so mingled by the defendant with other property as to destroy its identity. While the creditors in that case were thus permitted to resort to the property for their satisfaction, their remedy was entirely different, not only as to the forum, but also in its nature. It proceeded upon the theory that the contract had been abrogated, and the creditors were following up and recovering their property, and not merely seeking to enforce the contract.

[The judgment of the lower court was reversed as to the item of $13.25, the claim for board.]

II. Estoppel

MERRIAM v. CUNNINGHAM.

(Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 40.)

Assumpsit for the keep of four horses. The principal defense was infancy. The plaintiff offered evidence tending to show that the defendant fraudulently represented himself to the plaintiff as being of full age, and thereby obtained credit for the amount sued for. He claimed that the defendant was thereby estopped to set up the defense of infancy. But the judge ruled that such representation upon the part of the defendant would be no reply to the defense of infancy, and excluded the evidence. Verdict for the defendant.[4]

Bigelow, J. The plaintiff seeks to avoid the defendant's plea of infancy in the present case by proof that the defendant fraudulently represented himself to be of full age, and thereby obtained credit for the keep of the horses, to recover the price of which this action of assumpsit is brought. But it appears to us, that no such answer to a plea of infancy can be allowed, without overturning the well established rules of law applicable to the contracts of minors. The plaintiff seeks to recover upon a contract which, upon plea and proof, is legally avoided. The fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or, in any way, enhance its obligation; it is the contract, which forms the sole right of the plaintiff to recover in this suit, and no liability upon it, as such, can be maintained against the defendant, who has established its legal invalidity. If the position assumed by the plaintiff is sound, then the result would be that a plaintiff in an action of assumpsit on a contract, which the law holds void, would recover damages for an injury caused by the fraudulent misrepresentations of the defendant. It is manifest that no such confusion of rights and remedies can exist in the law. Besides; in an action of assumpsit, the measure of damages is the amount which the defendant promised to pay by his contract; but for fraudulent representations the plaintiff could recover only the damages actually sustained; which might, and often would be much less than the amount due on the contract, for the very reason, that the infant may have been overreached, and promised to pay more than an equivalent for that which he received by the contract. The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings.

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[4] Statement abridged.

It is by no means clear, that an action ex delicto can be maintained against an infant for fraudulently representing himself to be of age, and by means of such representation and deceit, procuring credit on a contract, which he subsequently avoids by a plea of infancy. The cases are not uniform on this question. The earlier authorities are clear to the point that no such action can be maintained. Johnson v. Pie, 1 Lev. 169, and 1 Keb. 905; Grove v. Nevill, 1 Keb. 778, 914; Green v. Greenbank, 2 Marsh. 485. It has been argued in regard to cases of this kind, that the representation itself is not actionable, because it is no injury. It is the avoidance of the contract which causes damage and creates the injury, and that was merely the exercise of a legal right by the infant for which no action will lie; that no such action can be maintained without making the contract an essential part of the right of recovery, which being void, leaves nothing upon which the infant can be legally charged. 20 Amer. Jur. 265; 1 Amer. Lead. Cas. 118; Bing. on Inf. (2d Am. Ed.) 113, note. But without expressing an opinion on this point, it is entirely clear that such false representations are no sufficient answer to a plea of infancy in an action on a contract. Even in New Hampshire,—where it is held that an infant is liable to an action ex delicto for fraudulent representations as to his age in procuring a contract, which he subsequently avoids by a plea of infancy, Fitts v. Hall, 9 N. H. 441,—it has been decided that such representations cannot be set up as an answer to a plea of infancy in an action on a contract. Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. See West v. Moore, 14 Vt. 447, 39 Am. Dec. 235; People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240. The only case cited by the plaintiff in support of his position, Bristow v. Eastman, 1 Esp. 172, does not sustain the doctrine for which he contends. That was an action in form ex contractu against an infant for a tort in embezzling money, and it was intimated by the court that the act being one for which an infant was in law liable, and to an action for which infancy was no defence, the form of the remedy might be the same as against an adult, and therefore that the plaintiff might waive the tort, and sue in assumpsit. The authority of this case has been questioned, 20 Amer. Jur. 267; and whether sound or not, furnishes no analogy to the case at bar.[5]

[Remainder of the opinion omitted. Other exceptions sustained.]

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[5] Studwell v. Shapter, 54 N. Y. 249 (1873); Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146 (1839); Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412 (1880), semble; Burdett v. Williams, 30 Fed. 697 (1887), semble.

WATTS v. CRESWELL.

(Mich. 1 Geo. In Chancery. 9 Vin. Abr. 415.)

Bill to have a discovery of the defendant's title to lands in B. mortgaged to the plaintiff, and likewise to have an account of the rents and profits thereof, &c. The case was, the defendant's father having occasion to borrow the sum of £300. the defendant was employed by his father to solicit the plaintiff to lend that sum upon a mortgage of the lands in B. which the father made affidavit of that he was seised in fee, and that the lands were free from incumbrances; the defendant being then about the age of 20 years, did carry a feoffment in fee and fine of the lands of the defendant's father to the counsel of the plaintiff, and the title was approved of, and the money lent, and a mortgage made to the plaintiff, and the defendant was a witness to the execution of the mortgage-deed, and likewise to the payment of the money. The defendant's father, after the defendant came of full age, took £100. more upon the same mortgage, and the defendant was privy to that transaction, but not a witness to the deed or payment of the money. The defendant by his answer says, that at the time of making the original mortgage, he had heard the lands were settled upon him after the death of his father, but had never seen the settlement. The defendant after the death of his father refuses to pay the mortgage, and claims the lands as remainderman in tail by virtue of a settlement by his grandfather upon the marriage of his father, &c. Counsel for the plaintiff insisted that the defendant, though an infant at the time of making the mortgage, was liable to make a satisfaction, because he was party to the fraud, and was privy to the whole transaction, and aiding and assisting to the cheat, and that though an infant cannot bind himself by contract at common law, yet he is liable to actions of tort, as trespass, case for words, &c. So is he liable to a forfeiture upon a condition in fact, or implied, &c. So in equity he is liable to make satisfaction for a fraud, &c.

Per COWPER, C. If an infant having a remainder upon an estate for life be a witness to a mortgage made by tenant for life, I do not think this would bind the infant, because if he was made a party to the deed, and sealed it, yet that would not bind him, and that is a much stronger case; yet I am of opinion in this case the defendant is liable, and ought to make satisfaction to the mortgagee, because at the time of this transaction he was very near being of full age, and solicited the plaintiff to lend the money, and produced this feoffment in fee to his father (which appears now to be forged), and was principally concerned all along in the fraud, when he knew at the same time, as he admits by his answer, that his father was but tenant for life, with remainder to himself. If an infant is old and cunning enough to contrive and carry on a fraud, I think in a court of equity he ought to make satisfaction for it. Decreed accordingly.[6]

Ex parte UNITY JOINT-STOCK MUT. BANKING ASS'N.

In re KING.

Ex parte KING.

(Court of Appeal in Chancery, 1858. 3 De Gex & J. 63.)

Application to a commissioner to allow the claim of the Unity Joint-Stock Mutual Banking Association against the Estate of Octavius King, a Bankrupt. It appeared that Octavius King had obtained advances from the applicant and had given a bond and other collateral security to secure the same. At the time he represented himself to be twenty-two years of age. He was in fact an infant. The commissioner allowed the proof. Appeal by the assignees and also a creditor.[7]

The Lord Justice KNIGHT BRUCE. It is unnecessary to say what in this case we might have thought it fit to do if we had been exercising a jurisdiction merely legal, for our jurisdiction is equitable as well as legal. Again, with respect to our equitable jurisdiction, it is not material to say what we might have thought the proper course to be taken in the absence of decision; for I think that, upon the admitted facts, the case is concluded by the judicial opinions of Lord Cowper, Lord Hardwicke, Lord Thurlow and other eminent judges, which it would be improper in us practically to question. A young man, who from his appearance might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of so doing represented himself to the petitioning creditor as of the age of twenty-two, expressly and distinctly so represented himself. We feel no difficulty or doubt on the question, whether the minor did at the time believe or not believe what he said, for it is impossible from the materials before us to infer that he did believe his statement to be true or was ignorant of his own age when he obtained the money. The question is, whether in the view of a Court of Equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt, whatever his liability or non-liability at law. In my opinion we are compelled to say that he has.

The Lord Justice TURNER. I have the strongest inclination to expunge this proof; but the authorities are too strong to permit us to do so. If the course which has been taken by Courts of Equity on this subject is to be altered, it must be so by the House of Lords and not by us.[8]

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[6] Accord: Evroy and Nicholas, 2 Eq. Cas. Abr. 488 (1733).

[7] Statement abridged.

BARTLETT v. WELLS.

(Court of Queen's Bench, 1862. 1 Best & S. 836.)

Declaration for goods bargained and sold, and goods bargained, sold and delivered; and for work and labour; and for money paid; and for money due on accounts stated.

Pleas. 1. Never indebted. Issue thereon.

2. That the defendant, at the time of the contracting of the said debt, was an infant within the age of twenty-one years.

Replication to the second plea upon equitable grounds: that the defendant, before and at the time of the accruing of the causes of action in the declaration mentioned, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he the defendant then was of full age, whereby the plaintiff, then having no knowledge or means of knowledge that the defendant then was not of full age, was induced to make and enter into the said contracts in the declaration mentioned, and to supply the said goods therein mentioned to the defendant; and that, but for such false and fraudulent representations as aforesaid, the plaintiff would not have entered into the said contracts or supplied the said goods, or any part thereof.

Demurrer and joinder therein.

Cockburn, C. J. I am of opinion that the replication affords no answer to the plea either at law or in equity. As to the first, the test is whether, upon the whole of the facts, taking the declaration, plea and replication together, the plaintiff makes out a cause of action against the defendant. The state of facts, so taken, is that the defendant, being a minor, represented himself to the plaintiff as a person of full age, and by that representation induced the plaintiff to enter into a contract with him, which he has failed to perform. If these facts were stated in extenso in the declaration, could the action be maintained? Clearly not. Therefore the replication affords no legal answer to the plea.

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[8] Accord: Cornwall v. Hawkins, 41 L. J. Ch. 435 (1872), decree for specific performance against infant; Pemberton Building & Loan Ass'n v. Adams, 53 N. J. Eq. 258, 31 Atl. 280 (1895), bill to foreclose; Goyer v. Morrison, 26 Grant's Ch. (U. C.) 69 (1878), bill to foreclose; United States Inv. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326 (1901), suit to foreclose; Commander v. Brazil, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117 (1906).

In any case, before any estoppel can be raised against the infant, all the elements of deceit must be present. Thus, there must be an actual fraudulent misrepresentation. Davidson v. Young, 38 Ill. 145 (1890); Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877 (1892); Thormaehlen v. Kaeppel, 86 Wis. 378, 56 N. W. 1089 (1893). The adult must rely upon it and be deceived. Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176 (1896).

Again, the facts stated in the replication would not be an answer if infancy were pleaded to a bill in equity for a specific performance of the contract. It may be that a Court of Equity would afford relief against a fraud of this nature on the part of an infant; but that would be only on the ground of fraud, not on the ground of contract. In the cases cited the suit was against the infant, in respect of a fraud, and redress was given against him because he had been guilty of fraud. Therefore those cases do not shew that fraud is an answer to a plea of infancy, which, both at law and in equity, avoids a contract except for necessaries; though a Court of equity would compel the infant to make restitution or do equity.

Moreover, the replication is a departure. The declaration is on a contract for money payable for goods supplied to the defendant; the plea answers that: the plaintiff seeks to put the plea aside by replying a tort. That is a departure, the nature of the cause of action being changed.

CROMPTON, J.[9] It is clear that if this had professed to be a replication based upon legal, and not upon equitable grounds, it would not prevent the defence pleaded by the plea from being applicable to the action. * * *

Then is it matter which may be set up, in a replication upon equitable grounds, under section 85 of the Common Law Procedure Act, 1854? I think not. I adhere to the rule stated by Mr. Bullen and Mr. Leake in the passage which I have read (see page 839); and I think that this replication would be a departure in equity as well as law, because the matter it sets up is an equitable right compounded of tort and contract. This is not matter on which the plaintiff might have gone into a Court of equity. There have been cases in which a Court of equity has acted in the exercise of its peculiar jurisdiction as to fraud, which is different from that in our Courts; but we are not to act as a Court of equity in enforcing mere equitable rights. The nearest case to this is Vorley v. Barratt, 1 C. B. N. S. 225, where the plaintiff sued for contribution as surety; the replication did not substitute a new right and alter the original liability, but set up a subsequent discharge. The answer to the plea there was that there was a mistake or collusion, which is different from setting up an answer which goes to a different course of action. I think that the rule is that an equitable replication cannot be pleaded to a legal plea if it merely shews that the plaintiff has some right in equity, which is ground for applying to a Court of equity.

Also the replication is bad as a departure, which is an objection open on general demurrer (though there has been some doubt as to that), because it sets up a tort, the original cause of action being a contract.

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[9] Part of the opinion of Crompton, J., is omitted.

[Opinion of Mellor, J., omitted.]

Judgment for the defendant.[10]

NEW YORK BLDG. LOAN & BANKING CO. v. FISHER et al.

(Supreme Court, Appellate Division, First Department, 1897. 23 App. Div. 363, 48 N. Y. Supp. 152.)

Patterson, J. This is an action for the foreclosure of a mortgage. All the allegations of the complaint are appropriate to such an action only. The defendant John H. Fisher, Jr., was the mortgagor. He interposed the defense of infancy, and that defense was fully proven. The mortgage and the bond to which it was collateral were therefore voidable, at the election of the mortgagor, who disaffirmed them by interposing the defense mentioned. The mortgage was given to raise money to enable the infant to construct a building upon his land, but that fact does not aid the plaintiff.

In Allen v. Lardner, 78 Hun, 603, 29 N. Y. Supp. 213, it was so decided. In that case, as in this, a mortgage was given by an infant as security for money borrowed, and which was used in the erection of a dwelling house on the minor's land. It was held that the mortgage was void on the ground of the infancy of the mortgagor. The general rule is not controverted by the plaintiff, the appellant here; but it is, in effect, claimed that by reason of fraud and misrepresentation on the part of the infant and his father, in the procurement of moneys and obligations from the plaintiff which constitute the consideration for the mortgage sought to be foreclosed, the court should ignore the defense of infancy, and recognize and enforce the mortgage, or declare a lien in favor of the plaintiff on the premises at least to the extent of advances made by the plaintiff in good faith and in ignorance of the disability of the mortgagor. That there was fraud and deception in the dealings between the parties out of which this mortgage security arose seems to be established; but that does not furnish a reason for the judicial establishment of the validity of the mortgage, in whole or in part. That either the infant or his father represented at that time the mortgage was made, or prior thereto, that such infant was of full age, does not affect this case. The infant is not estopped from insisting upon his defense, even though he himself falsely stated that he was over 21 years of age.

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[10] Levene v. Brougham (King's Bench Division, before Ridley, J.) 24 Times Law Rep. 801 (1908). The plaintiff was a money lender and the claim was against the defendant as maker of a promissory note for £700, in favor of the plaintiff, dated October 14, 1907, and payable on March 1, 1908, with interest thereon at the rate of 5 per cent. per annum. The defense was infancy. It appeared that on October 14, 1907, the plaintiff loaned to the defendant £500, and took from him the promissory note in question. The defendant was on that date under the age of 21 and did not attain that age until May 26, 1908. Mr. Gregory, for the defendant, stated that an offer to pay back the amount of the loan, £500, with reasonable interest, had been declined by the plaintiff, and therefore the defendant relied upon the Infant's Relief Act of 1874. Evidence was then introduced tending to prove that at the time the defendant borrowed the money he represented himself to be over 21 years of age. Mr. Justice Ridley, in giving judgment, said that on the evidence he found that the defendant did say that he was 21½ years of age. He thought that on the authorities the defendant was liable upon the note on the ground that there was an equitable liability resulting from the misrepresentations. He accordingly gave judgment for the plaintiff for the amount claimed, with costs.

In Studwell v. Shapter, 54 N. Y. 249, the court considered the effect of false representations by an infant as to his age, and remarked that such representations would not make the infant liable on his contract; and in Heath v. Mahoney, 7 Hun, 100, the court says: "It is very clear that the agreement entered into between the parties was invalid, by reason of the infancy of the defendant. An infant is, however, liable for his willful torts and for damages for frauds committed by him; but no fraudulent representation made by an infant can give validity to any contract entered into by him which would otherwise be voidable for his infancy. Studwell v. Shapter, 54 N. Y. 249, and cases there cited. The action must, in all cases, arise solely upon the tort or wrong committed by him."

In Kobbe v. Price, 14 Hun, 55, the court refers to the case of Studwell v. Shapter, and states that in that case "it was held that fraudulent representations made by an infant to induce another person to enter into a contract with him would not give validity to the contract itself. In that case, as in this, the action was brought upon the contract itself, and not for any fraud perpetrated by means of alleged false representations. The evidence tended to show false representations, but the court held they were insufficient to charge the defendant with legal liability on the contracts which the plaintiffs were by those representations induced to enter into with the infant." The language last quoted is directly applicable to the case at bar. The text writers announce the same rule. Tyler, Inf. pp. 53, 57, where numerous authorities sustaining the proposition are cited.

Apart, therefore, from the consideration that under this complaint, as it is framed, there are no allegations to support an award of any other relief than that strictly applicable to the foreclosure of a valid mortgage, it seems to be settled that the fraudulent representations of the minor in relation to his age would not be the basis of any other action than one upon the case for deceit.

It is also claimed that the infant should not be allowed to repudiate his contract without making restitution of that which he has received under it. It is true that courts of equity have gone to a considerable extent in the direction of compelling minors who seek to avoid their contracts on the ground of infancy to make restitution of what they have received from those who were in ignorance of the disability at the time the contract was made, but in every one of those cases it was made to appear that the infant still retained in his possession or under his control that which he had received or some part of it. If he has disposed of, spent, or even squandered the money or other consideration received, his right to disaffirm is not limited or affected. Kane v. Kane, 13 App. Div. 544, 43 N. Y. Supp. 662; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233. But it is to be observed in this case that no part of the consideration for this mortgage was paid to the infant himself, although moneys were expended for the benefit of his real estate upon which the mortgage was given. The sum of $1,422.19 was disbursed by the plaintiff on account of the land. That sum consisted of an advance of $1,000 for the purpose of filling in sunken lots, $150.52 paid for fire insurance premium, and two other items paid for interest on two other mortgages on those lots; but none of this money ever was paid to the infant. There is no way by which those advances can be returned to the plaintiff through a foreclosure of the void mortgage. A similar question was presented in Allen v. Lardner, supra, and it was there held that, upon disaffirming the bond and mortgage in that case, no restitution by the infant was necessary of the moneys advanced on the mortgage, and which had gone into the improvement of the property covered by that mortgage.

The judgment of the court below was right, and must be affirmed, with costs. All concur.[11]

III. Acts of Infant After He Comes of Age Which Preclude Him from Interposing the Defense of Infancy—Affirmance

PROCTOR v. SEARS.

(Supreme Judicial Court of Massachusetts, 1852. 4 Allen, 95.)

Contract on a promissory note payable to the plaintiffs, and executed by the defendant during his minority.

At the trial in the superior court, "the plaintiffs testified that the defendant said he would pay the note the first he paid after paying a certain mortgage; also that in a second conversation the defendant told the plaintiffs he would pay $25 towards it, and pay the rest in instalments; also that in a third conversation the defendant said he ought not to pay all, but would pay $25 for the note." The defendant denied that he ever promised to pay the note since his majority, but admitted that at one time he promised to pay $25 for the note, and at another time said he would pay some part of the note rather than make any trouble, but always said he did not think he owed it. On cross-examination, the defendant testified that he had always admitted it was a debt, and that he would pay it when he could. Allen, C. J., instructed the jury that an acknowledgment of the debt by the defendant would not be sufficient to entitle the plaintiffs to recover, but there must be a promise to pay it; and if the promise was to pay the debt when the defendant should be able to do so, there must be proof of his ability to pay it, to entitle the plaintiffs to recover.

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[11] Accord: Carolina Interstate Building & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975 (1896); Wilkinson v. Buster, 124 Ala. 574, 26 South. 940 (1899).

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

METCALF, J. The right instructions were given to the jury. It has long been settled—as was said by Parker, J., in Smith v. Mayo, 9 Mass. 64, 6 Am. Dec. 28—that "a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment will not have the effect." See the authorities collected in 2 Greenl. Ev. § 367, and Story on Sales (3d Ed.) 36, 37.[12]

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[12] "Such ratification [by an infant after he comes of age] may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in the cases of the statute of limitations. A promise to pay, is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise: as, if the party should say, after coming of age, 'I do ratify and confirm,' or, 'do agree to pay the debt.'" Per Parker, C. J., in Thompson v. Lay, 4 Pick. (Mass.) 48, 49, 16 Am. Dec. 325 (1826).

Per Upham, J., in Hale v. Gerrish, 8 N. H. 374, 376 (1836): "The rule in this case is different from that where the statute of limitations is pleaded. An acknowledgment of a subsisting debt, where a claim has been barred by the statute of limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification, after he comes of age. This ratification must either be a direct promise, as by saying, 'I ratify and confirm,' or, 'I agree to pay the debt,' or by positive acts of the infant after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification, as an express and unequivocal promise."

Per Taylor, C. J., in Alexander v. Hutcheson, 9 N. C. 535, 537 (1823): "The distinction established between such an act as shall deprive the defendant of the benefit of the statute of limitations, and such a one as shall destroy the defense of infancy, is founded in good sense and ought to be maintained. In the first case there was a legal obligation to pay, arising from the original assumpsit, against which obligation the length of time operates as a bar; and a mere admission that the debt is not paid shows that the presumption, on which the statute is founded, fails in its application to the case. But, in the case of an infant, the law regards him as positively incapable of contracting a legal obligation, except for necessaries, and, therefore, aims to prevent his being imposed upon by persons of more experience. Whether an infant be under a moral obligation to pay a debt must depend on the circumstances under which the contract was made; and, if it can be clearly collected from them that advantage has been taken of his inexperience for the purpose of imposing on him, he may very justly shelter himself under his privilege. But supposing the contract to have been equitable, and a moral ob-

The testimony in the case was contradictory; and the jury must have found, under the instructions which they received, that the defendant did not promise, after he came of age, to pay the note; or, that if he did promise to pay it, or a part of it, when he should be able, the plaintiffs had not proved that he was able to pay. Thompson v. Lay, 4 Pick. 48, 16 Am. Dec. 325.

Exceptions overruled.[13]

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ligation thus created, the mere acknowledgment of it can have no legal effect; for such an obligation can, at the utmost, only amount to a consideration for an actual promise. Therefore, I have no hesitation in saying, that a new trial ought to be awarded."

It follows, from the fact that a mere acknowledgment of the debt is not enough to preclude the infant from setting up the defense of infancy, that a payment of interest or part payment of the principal after the infant comes of age is not. Thrupp v. Fielder, 2 Esp. 628 (1797); Catlin v. Haddox, 49 Conn. 492, 44 Am. Rep. 249 (1882); Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28 (1812); Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900). Clearly the promise of the infant to a third person is not sufficient. Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380 (1838).

[13] Per Parker, C. J., in Thompson v. Lay, 4 Pick. (Mass.) 48, 49, 16 Am. Dec. 325 (1826): "But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened, or been complied with, before an action can be sustained. 'I ratify and confirm my promise, provided I receive a certain legacy,' or, 'if I succeed to a certain estate,' or 'if I recover a certain sum of money,' or, 'if I draw a prize in a certain lottery,' would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So an engagement or promise to pay when able is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient."

See, also, Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245 (1892).

Whether, upon the proper construction of words used by the infant, he has or has not made a new promise to pay or a ratification of a former promise, or whether his new promise to pay is conditional or not, are questions which cause the most trouble, and upon which the action of the courts can hardly be predicted in most cases. For instance, compare the results reached in Whitney v. Dutch, 14 Mass. 460, 7 Am. Dec. 229 (1817), with those reached in Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245 (1892), with respect to the late infant's promise that he would try to pay, endeavor to pay, or procure payment to be made. Consider the length to which the court went in Hale v. Gerrish, 8 N. H. 374 (1836), in holding there was no new promise to pay. Observe the holding in Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103 (1813), that the words appended to the new promise did not make a condition, but merely postponed the time of payment till the promisor returned, so that when he died before returning, his estate was liable. In the following cases the words used by the infant were held sufficient to create a new promise: Wright v. Steele, 2 N. H. 51 (1819); Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307 (1852); Hatch v. Hatch's Estate, 60 Vt. 160, 13 Atl. 791 (1887); Orvis v. Kimball, 3 N. H. 314 (1825); Stokes v. Brown, 4 Chand. (Wis.) 39 (1851); Jackson v. Mayo, 11 Mass. 147, 6 Am. Dec. 167 (1814).

MERRIAM v. WILKINS.

(Supreme Court of Judicature of New Hampshire, 1833. 6 N. H. 432, 25 Am. Dec. 472.)

Assumpsit for goods sold and delivered. The cause was tried in the common pleas, at September term, 1833, and a verdict taken for the plaintiffs, subject to the opinion of this court, on the following case:

The goods mentioned in the declaration were sold, and delivered to the defendants by the plaintiffs, but at the time of sale Erastus Wilkins was an infant, under the age of twenty-one years. But to obviate the objection of his infancy the plaintiffs proved, that, after the commencement of this action, and after Erastus arrived at the age of twenty-one years, he declared that he would not take advantage of his infancy in the action.

Richardson, C. J., delivered the opinion of the court.

We are of opinion that this action cannot be sustained against Erastus Wilkins. In Wright v. Steele, 2 N. H. 51, it was decided, that a promise made after the commencement of the action, and after the minor arrived at the age of twenty-one years, might be considered as a waiver of the defence of infancy so that the contract might be considered as valid from the beginning. But this view is sustained by no other authority, and cannot be reconciled with what must now be considered as settled principles of law on this subject.

It was supposed in that case that there was a close analogy between the case of a debt taken out of the statute of limitations by a new promise, and a contract of an infant ratified by a promise made after he comes of age; and that this analogy was close enough to sustain that decision. But there is, in truth, no analogy between the two cases. In the case of the statute of limitations the new promise does not create a new cause of action, but shields an old one from the operation of the statute.

But in the case of infancy there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. 2 B. & C. 824, Thornton v. Illingworth; 1 Pick. (Mass.) 202, Ford v. Phillips.

The contract of an infant to pay for goods, sold and delivered to him, is, unless the goods are necessaries, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them, made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified.

In this case the plaintiffs may enter a nolle prosequi as to the infant, and take judgment on the verdict against the other defendant.[14]

EDGERLY v. SHAW.

(Supreme Court of Judicature of New Hampshire, 1852. 25 N. H. 514, 57 Am. Dec. 349.)

Assumpsit upon a promissory note, made by the defendant while an infant, payable to John Barker, or order, and by him indorsed to the plaintiff, without recourse. The declaration follows the usual form of declaring upon indorsed notes.

The plaintiff called Barker to prove a new promise after the defendant became twenty-one years of age. He testified that while he held and owned the note, he told the defendant, who is a joiner, that he was about having some work done, and he wished the defendant would come and pay him. The defendant answered that he was then engaged to others, but that at the end of six weeks he would come and work for him at a dollar a day, and thus pay him, or else he would pay him in money, but he never did any work for Barker. The defendant objected that this promise would not enable the plaintiff to maintain the suit, and a verdict was taken for the plaintiff, subject to the opinion of the court upon the exception.

Gilchrist, C. J.[15] * * * In the case before us, the defendant, on being asked by the plaintiff to pay, said that at the end of six weeks he would come and work for him, at a dollar a day, or else he would pay him the money. This was a qualified promise to pay, depending on a contingency. For the period of six weeks the defendant reserved to himself the right to pay in labor, at a dollar a day. During that time it was contingent whether his promise to pay the money would become binding, and until the expiration of that period, it was uncertain whether the original contract would be confirmed, or the alternative promise would be performed. Until the end of six weeks no action could be brought, either upon the old or the new contract; but after the six weeks had elapsed, after the right reserved by the defendant to pay in labor had ceased, the new promise to pay in money became absolute, and the old contract was absolutely confirmed, and the defendant was then liable to be sued upon either contract. It does not appear whether the action was brought before or after the expiration of the six weeks. We take it for granted, however, that it was brought after that time.

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[14] Accord: Thornton v. Illingworth, 2 B. & C. 824 (1824); Ford v. Phillips, 1 Pick. (Mass.) 202 (1822); Freeman v. Nichols, 138 Mass. 313 (1885); Hyer v. Hyatt, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977 (1827). Contra: Wright v. Steele, 2 N. H. 51 (1819); Best v. Givens, 3 B. Mon. (Ky.) 72 (1842).

[15] Part of opinion omitted.

The effect of the new promise, after it became absolute, being to ratify and confirm the note, and to give it the same validity as if the promisor had been of legal capacity to make the note at the time of its date, it was from that time at least a good negotiable note, transferable according to its terms, and the action may well be brought in the name of the indorsee. Reed v. Batchelder, 1 Metc. (Mass.) 559. If an action had been brought upon the new promise, it must have been in the name of Barker, because that contract is not negotiable. * * *

Judgment on the verdict.[16]

ANDERSON v. SOWARD.

(Supreme Court Commission of Ohio, 1883. 40 Ohio St. 325, 48 Am. Rep. 687.)

The plaintiff in error filed his petition in the common pleas and alleged: That said defendant executed and delivered to him on the 12th day of February, 1868, his certain promissory note of that date, a copy whereof with all endorsements thereon is hereto attached and made part of this petition, and thereby promised to pay to the order of said plaintiff the sum of thirty dollars within one day from and after said date. Said note is long past due and no part thereof has been paid, except the sum of ten dollars on the 17th day of June, A. D. 1868, and on said 17th day of June, 1868, defendant promised to pay the balance due on said note, and there is due thereon from said defendant to the plaintiff the sum of $20.63, with interest from June 17th, 1868, wherefore plaintiff prays judgment against said defendant for the sum of $20.63, with interest from June 17th, 1868, to which the defendant answered: That at the time said note is alleged to have been given, to wit: February 12th, 1868, he was a minor, that he was under 21 years of age, and that he made the payment of ten dollars on said note without the knowledge that he was not legally liable on said note. That he was 21 years of age on the 21st day of March, 1868.

The plaintiff demurred to this defense and the court overruled the demurrer. The plaintiff failing to reply, judgment was given for the defendant. This judgment was affirmed by the district court, and to reverse both judgments a petition in error is filed here.

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[16] A fortiori, where the new promise is absolute when made, the indorsee can sue the maker upon the note. Reed v. Batchelder, 1 Metc. (Mass.) 559 (1840); Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735 (1827).

A fortiori, also, the original promisee can, after the new promise made by the late infant, maintain a suit upon the original promise. If infancy is pleaded he may reply the new promise. Hunt v. Massey, 5 Barn. & Adol. 902 (1834); West v. Penny, 16 Ala. 186 (1849); Hodges v. Hunt, 22 Barb. (N. Y.) 150 (1856). Contra: Bliss v. Perryman, 1 Scam. (Ill.) 484 (1838).

Observe, however, that in Hodges v. Hunt, supra, the court refers to the plaintiff's right to sue upon the original promise made during infancy as an anomaly in the rules of pleading, while in West v. Penny, supra, it is supported as the logical result of regarding a new promise as in legal effect "a waiver of the defense of infancy."

McCauley, J. The contracts of an infant generally are not void, but only voidable. Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. There is nothing in the case to show that the note set forth in the petition is such as should be held to be void. It is conceded that the contract is one that might be ratified by the minor after his majority, and that the part payment of the note and the promise alleged in the petition amount to a ratification, unless it was necessary that the defendant when he made the payment and promise, knew that his infancy when the note was given, was a defense in law to an action on the note.

Counsel for defendant in error refer to Hinely v. Margaritz, 3 Pa. 428; Curtin v. Patton, 11 Serg. & R. (Pa.) 311; Reed v. Boshears, 4 Sneed (Tenn.) 118; Norris v. Vance, 3 Rich. Law (S. C.) 168; Owen v. Long, 112 Mass. 428; Fetrow v. Wiseman, 40 Ind. 148; Harmer v. Killing, 5 Esp. 102; and many other cases in which it is claimed this knowledge has been held to be necessary to a ratification. An examination of all these cases and many others in which the rule as claimed, is in some way recognized, shows that in one case only, that of Hinely v. Margaritz, has the rule been held. In no one of a great number of cases in which it is stated as the law, or in some way referred to, was the rule involved or in any way pertinent to the case. The necessity of such knowledge has been stated as the law, in numerous text books, as an exception to the rule that a promise to perform a contract made with knowledge of the facts which make a defense waives the defense. As in Rindskopf v. Doman, 28 Ohio St. 516; Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Fowler v. Brooks, 13 N. H. 240. But no one of those thus stating the rule has attempted to give any reason why this knowledge should be necessary to affirm a contract made in minority, when it is conceded not to be necessary to waive a defense in any other case.

In many, or all of the cases above referred to, it is stated that a ratification made with knowledge that minority was a defense, was complete and binding. If a promise without this knowledge was sufficient, the knowledge superadded would not detract from the affirmance. But in Morse v. Wheeler, 4 Allen (Mass.) 570, and Taft v. Sergeant, 18 Barb. (N. Y.) 320, the necessity of such knowledge was directly involved and in both cases it was held that a contract could be affirmed by a promise to pay after majority, whether it was known or not that minority was a defense. We assent to the rule stated in these cases, that a ratification after majority is a waiver of a purely personal privilege, and that the general rule, that a new promise made with knowledge of the facts which make a defense, waives the defense, is quite as applicable to a case of this kind as to any other.

Judgment reversed.[17]

EDMUNDS v. MISTER.

(Supreme Court of Mississippi, 1881. 58 Miss. 765.)

CHALMERS, C. J., delivered the opinion of the court.

Robert H. Edmunds, a young man of handsome estate, became of age on the 12th of July, 1859. He was already burdened with debts, contracted by him during minority, amounting to about $2,000, and on the 19th of March, 1860, without having theretofore done anything either in affirmance or in disaffirmance of these debts, he executed and placed on record a deed whereby he conveyed the bulk of his estate, real and personal, to his infant daughter, then two months of age, for and during the term of her natural life, leaving the reversion in himself. He declared at the time that he intended by the act to defeat the holders of claims contracted during his minority, as to the estate conveyed; but that he was unwilling to plead minority, and intended to pay the debts. How he was to pay them does not appear, nor did he then declare, though he now says that he intended to do so out of his wife's estate.

Edmunds continued to become more and more involved until his total indebtedness finally amounted to more than $9,000. Suits were eventually brought against him by his various creditors, and in these suits no attention seems to have been paid to any distinction between his debts, as to whether they were contracted before or after majority, or before or after the date of the conveyance to the daughter. It is certain, however, that the debts contracted between his arrival at majority and the date of the conveyance (a period of eight months) were trifling. The suits all ripened into judgments, no plea of minority having been interposed in any of them. Under sales made by virtue of these judgments, defendants have held the lands now sued for, during many years. The plaintiff is the daughter of Edmunds, to whom, when she was two months old, he conveyed a life-estate in the property, and she brings this action of ejectment to recover the lands and mesne profits. The conveyance to her is older than the judgments, through which defendants claim, but, being voluntary, is fraudulent and void if the holders of the demands against Edmunds for goods furnished during minority were legal creditors at the date of the conveyance. At the time the goods were furnished, Edmunds had a guardian; and in discussing the question at issue we shall assume, as indeed the law does in the absence of proof, that they were not necessaries in contemplation of law, nor furnished under such circumstances as that their reception, of itself, imposed a legal liability upon him. The executory contracts of infants for the payment of money, not for necessaries, impose no legal liability upon them. They furnish a sufficient consideration to support contracts thereafter made, so that if ratified in any way after majority they will be enforced; but they derive their vitality, not from the original consideration, but from the new promise or ratification. They can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. The contract made during minority will furnish the consideration, but it will furnish nothing more. All else must be supplied by the new agreement. A mere acknowledgment of the debt is not sufficient, but there must be an express promise to pay, voluntarily made; and this is true under the common-law authorities, without reference to the provisions of our statute, which declares that the new promise or ratification must be in writing. Code 1857, p. 360, art. 8.

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[17] Accord (in addition to the cases cited in the opinion): American Mortgage Co. v. Wright, 101 Ala. 658, 14 South. 399 (1893); Bestor v. Hickey, 71 Conn. 181, 41 Atl. 555 (1898); Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774 (1880); Ring v. Jamison, 2 Mo. App. 584 (1876); Id., 66 Mo. 424 (1877). Compare Davis v. Kerr, 17 Canada Sup. Ct. 235 (1889).

There cannot be said to be any contract in any legitimate sense of the term until after the act of ratification, or until after the written promise under our statute. Before ratification, it is wholly unilateral in its bearing; that is to say, the consideration has been advanced by the adult, but there is no corresponding legal liability upon the minor. It stands, not upon the footing of a debt barred by the Statute of Limitations and afterwards revived by a new promise, because in such a case there has always been an existing, unextinguished right, since limitation affects only the remedy, and not the right; but it is rather like a debt wiped out by a discharge in bankruptcy. In such case there is no existing debt, but there is an outstanding consideration which will support a new contract. This is the illustration used in Hodges v. Hunt, 22 Barb. (N. Y.) 151, and in Taft v. Sergeant, 18 Barb. (N. Y.) 320. It is an anomaly in pleading that the plaintiff declares upon the original contract, and to a plea of infancy replies the new promise, while all the authorities declare that the recovery is not upon the original contract, but upon the new promise; and yet undoubtedly the anomaly exists. While this is true, it is clear that if the declaration should set out the whole facts,—that is, if it showed that the articles were furnished to a minor, that they were not necessaries, and that there had been no new promise,—it would be demurrable; or if judgment by default was taken upon it, it would be reversed upon appeal. The reason is that it would show no cause of action, and it would show no cause of action because of the absence of a new promise. It is the new promise, therefore, that makes the debt, and without it there is none. Tylor on Inf. & Cov. § 46 et seq., and authorities cited.

It follows, from these well-settled principles, that the holders of claims against Edmunds which were for articles, not necessaries, furnished during minority and not ratified after majority, were not legal creditors at the date of his conveyance, and cannot predicate fraud of it, though it was voluntary.

If defendants can show that the judgments through which they hold embraced, in whole or in part, debts created after the attainment of majority, and before the date of the conveyance, or were in whole or in part for necessaries furnished during minority, under circumstances which imposed a legal liability upon the infant, they can successfully resist plaintiff's demand, but the burden of doing this rests upon them; and while there is something to suggest that debts contracted after the disability of minority had ceased, and before the execution of the conveyance, may have entered into some of the judgments, this does not clearly appear. The ruling of the court below rendered any such showing upon the part of the defendants unnecessary.

The learned judge, adopting the view that minority was a personal privilege, which could not be set up by any one but the minor, and that he could only do so by pleading it when sued, excluded all testimony as to the debts having been contracted during minority; and this was at once an end of plaintiff's case.

He confounded therein the executed and the executory contracts of infants, and seems to have been partly, at least, led into this error by the course of counsel, who respectively contended, the one, that the making of the deed to the daughter was a disaffirmance of the minority debts, and the other, that it was not. But it is not a question of disaffirmance, but of affirmance. Executed contracts of infants must be disaffirmed or they will become obligatory; executory contracts must be affirmed or they will be null. Until affirmed, they impose no liability. There was no pretence of affirmance here, and no act of disaffirmance was necessary.

True, when sued, Edmunds failed to plead minority, and judgments went against him. From the rendition of those judgments, and not until then, the claims of the creditors became valid debts against him; but he had several years before made the conveyance to his daughter, and it was not possible for him, by then making the debts valid, to affect the title previously conveyed. It is well settled that suffering judgment to go upon a debt barred by the Statute of Limitations will not affect the title to property sold before judgment, and after the bar was complete; and a fortiori must this be true as to minority debts, which have no binding force until judgment.

Whether the principle would apply, as to the Statute of Limitations, where the conveyance was unsupported by a valuable consideration, we have not found settled by adjudication; but certainly it must as to the unratified minority debts of an infant, since as to them there is no legal indebtedness.

Neither the research of counsel nor our own has discovered any adjudicated case similar in its facts or wholly analogous in principle to the one at bar; but we feel satisfied that the general principles controlling the liabilities of infants must lead to the conclusion here reached.[18]

[Balance of opinion omitted.]

BOYDEN v. BOYDEN.

(Supreme Judicial Court of Massachusetts, 1845. 9 Metc. 519.)

Assumpsit for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the court of common pleas, before Williams, C. J., the plaintiff gave in evidence a promissory note for $44, given to him by the defendants on the 12th of April, 1838. The defence was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

SHAW, C. J. The questions as to what contracts of an infant are void, and what voidable, and, in the latter case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, ab initio, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it,[19] such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of the opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See Boody v. McKenney, 23 Me. 517.

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[18] Contra: Palmer v. Miller, 25 Barb. (N. Y.) 399 (1857).

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[19] Accord: Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735 (1827); Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526 (1832); Deason v. Boyd, 1 Dana (Ky.) 45 (1833); Robinson v. Hoskins, 14 Bush (Ky.) 393 (1878); Shropshire v. Burns, 46 Ala. 108 (1871), sale by administrator; Hubbard v. Cummings, 1 Greenl. (Me.) 11 (1820); Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84 (1830); Williams v. Mabee, 7 N. J. Eq. 500 (1849); Uecker v. Koehn, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849 (1887), case of mortgage also; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538 (1889); Aldrich v. Grimes, 10 N. H. 194 (1839); Weed v. Beebe, 21 Vt. 495 (1849); Curtiss v. McDougal, 26 Ohio St. 66 (1875).

In the following cases it was held that an acceptance after coming of age by the late infant of the consideration of a contract, or any part thereof, would preclude his defense of infancy: Smith v. Low, 1 Atk. 489 (1739), accepted rent after coming of age; Keegan v. Cox, 116 Mass. 289 (1874); Jones v. Phœnix Bank, 8 N. Y. 228 (1853); Highley v. Barron, 49 Mo. 103 (1871); Franklin v. Thornebury, 1 Vern. 132 (1682); La Cotts v. Quertermous, 84 Ark. 610, 107 S. W. 167 (1907); Damron v. Ratliff, 123 Ky. 758, 97 S. W. 401, 30 Ky. Law Rep. 67 (1906); Hobbs v. Nashville, C. & St. L. Ry. Co., 122 Ala. 602, 26 South. 139, 82 Am. St. Rep. 103 (1899).

Exceptions overruled.[20]

CALLIS v. DAY.

(Supreme Court of Wisconsin, 1876. 38 Wis. 643.)

Appeal from the Circuit Court for Grant County.

Foreclosure of a mortgage. The answer alleged that the mortgage, and note secured thereby, were without consideration, and that defendants were infants at the time of making them, and had disavowed and revoked them. Reply, that defendants had confirmed the mortgage after majority, and that it was given to secure a part of the purchase price of the mortgaged premises, which, on or about the day of its date, were sold to the defendant Jeremiah M. Day.

It appeared that defendants were minors at the time of the execution of the note and mortgage. There was conflicting evidence as to whether the mortgage was given to secure the purchase price of the premises. The court found as facts, among other things, that the instruments were made and delivered to one Bradley, as alleged in the complaint, and by him duly assigned to the plaintiff; that when the same were executed, defendants were infants; that the mortgaged premises were purchased of Bradley by John P. Day, the father of Jeremiah M. Day, before the execution of the mortgage, and conveyed to the defendant Jeremiah M. Day, instead of to John P. Day, by direction of the latter, such conveyance being by warranty deed, dated on the day of the date of the instruments in suit; and that said instruments were given to secure the payment of $200 of the purchase money agreed to be paid by John P. Day to Bradley for the premises.

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[20] Accord: Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617 (1833); Thomasson v. Boyd, 13 Ala. 419 (1848); McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312 (1888); Philpot v. Sandwich, 18 Neb. 54, 24 N. W. 428 (1885); Hilton v. Shepherd, 92 Me. 160, 42 Atl. 387 (1898).

The same rule obtains when the infant purchases real estate. Henry v. Root, 33 N. Y. 526 (1865); Hook v. Donaldson, 9 Lea (Tenn.) 56 (1882); Mission Ridge Land Co. v. Nixon (Tenn. Ch.) 48 S. W. 405 (1897); Ellis v. Alford, 64 Miss. 8, 1 South. 155 (1886), exchange; Williams v. Brown, 34 Me. 594 (1852), exchange. See, also, cases post, p. 172, where the infant who retained leased premises after he came of age was held liable for the rent accruing while he was an infant.

In McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572 (1868), the late infant's land was not subject to a mechanic's lien where she used the improvements after she came of age.

In Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654 (1870), it was held in foreclosure proceedings that the late infant was not liable on a contract to assume to pay the mortgage debt when she took title from the original mortgagor—she having conveyed before coming of age—although she had used and enjoyed the proceeds of sale after arriving at majority.

The court held that the plaintiff was entitled to judgment of foreclosure; and from the judgment rendered accordingly defendants appealed.

Cole, J. There is an irreconcilable conflict in the testimony as to what was the consideration of the notes and mortgage. The court below found that they were given to secure the payment of part of the purchase money agreed to be paid for the lands which were conveyed by Bradley to the defendant Jeremiah M. Day. We are not disposed to dissent from this view of the effect of the testimony. We shall not discuss the facts at all, but state the result at which we arrived upon an examination of the evidence. The court also found the fact set up in the answer to be true, namely, that the mortgagor and wife were infants when they executed the notes and mortgage. It appears, however, that the defendants are in possession of the mortgaged premises, claiming to own them. The defense set up and relied on in the answer is, in substance, that there was no valid consideration of the notes and mortgage, and that these obligations were void because executed by them when infants. But while the disability of infancy is insisted upon in the answer, and the contracts are disaffirmed, there is no offer to restore the land. The fact being proven, as we think it is, that the notes and mortgage were given for a part of the purchase money of the mortgaged premises, effectually puts at rest all question as to the sufficiency of the consideration. But the further question arises, whether the defense of infancy under the circumstances must prevail. Mr. Schouler, in his work on Domestic Relations (title, Infancy, p. 518 et seq.), has collated many authorities which treat of the void and voidable contracts of infants. He observes, in substance, that it is difficult to give a clear and infallible test between these two classes of contract, but that the general distinction is this: A void contract is a mere nullity, of which any one can take advantage, and which is, in legal estimation, incapable of being ratified; while a voidable contract becomes, at the option of the infant, though not otherwise, binding upon himself and all concerned with him. Acts and circumstances which amount to a legal ratification serve to make the voidable contract completely binding. "It is held that an infant may make a voidable purchase of land; for, says Lord Coke, striking the legal principle with wonderful clearness for that day, 'it is intended for his benefit,' and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase." Schouler's Dom. Rel. p. 539. Various acts amount to a legal ratification of a voidable contract. "Where an infant purchases property and continues to enjoy the use of the same, and then sells it or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot avoid payment of the consideration." Schouler, supra, p. 588; Boody v. McKenney, 23 Me. 517; Hubbard v. Cummings, 1 Me. 11; Robbins v. Eaton, 10 N. H. 562; Boyden v. Boyden, 9 Metc. 519; Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84. The case of Lynde v. Budd is quite analogous in its principal features to the one before us. There the infant, Budd, took a conveyance of land, and gave a bond and mortgage for part of the purchase money. The infant went into possession of the land, and continued in possession until after he became of age, and then conveyed the property to one Rouse. In an action to foreclose the mortgage, the question was raised, whether the grantee of the infant did not take the land discharged of the incumbrance. Chancellor Walworth says: "The contract with the infant in this case was not void, but only voidable at the election of the grantee when he became of age. He might then have relinquished the property to the grantor, and claimed back the money which had been paid at the time of the purchase. Willis v. Twambly, 13 Mass. 204. But by continuing in possession after he became twenty-one, and finally selling and conveying the land with warranty, he affirmed the contract."

The doctrine of these cases is both reasonable and just, and is decisive of the one before us. Treating the deed of the land and the notes and mortgage as parts of the same transaction, there can be no doubt that the contract was one quite beneficial to the infants. They have elected to affirm it by retaining the possession of the premises and claiming them as their own. It would be most inequitable to allow them to repudiate the notes and mortgage given for part of the purchase money and also to keep the land. In the language of Shaw, C. J., "If the infant, after coming of age, retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred." Boyden v. Boyden, supra. The evidence in this case is abundant to show an affirmance of the original contract of purchase.

By the Court. The judgment of the circuit court is affirmed.[21]

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[21] Accord: Young v. McKee, 13 Mich. 552 (1865); Curtiss v. McDougal, 26 Ohio St. 66 (1875); Hubbard v. Cummings, 1 Me. 11 (1820).

It should be observed, however, that if the infant disaffirms the purchase-money chattel mortgage the sale is avoided and revests title in the seller, who is entitled to the possession of the chattel. Heath v. West, 28 N. H. 101 (1853).

THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BLDG. SOCIETY.

(Court of Appeal, 1902. 1 Ch. 1.—House of Lords. L. R. [1903] A. C. 6.)

Appeal against the decision of JOYCE, J. [1901] 1 ch. 88.

The action was brought by a married woman, suing in respect of her separate estate, to set aside a mortgage which she had executed to the defendant society when she was an infant.

In June, 1898, the plaintiff, then a married woman, but under the age of twenty-one, was on her application duly admitted a member of the defendant society, who were registered under the Building Societies Act, 1874. Early in July, 1898, she applied on the forms of the society for a loan of £1200., to enable her to purchase some freehold land, and to complete six houses then in course of erection on the land by her husband, who was a builder. The application was granted, and the transaction was carried out by two deeds [executed at the same time],[22] dated respectively July 21 and 22, 1898. By the deed of July 21 the land was conveyed to the plaintiff in fee simple in consideration of £393. expressed to be paid by her to the vendor out of her separate estate. By the deed of July 22 (in the usual form of a mortgage to a building society) the plaintiff mortgaged the property to the defendant society as security for advances up to £1200., to be made by them to her, which were to be repaid by monthly instalments. The sum of £250., part of the purchase-money of the property, was paid by the defendants on behalf of the plaintiff to the vendor. They from time to time after the execution of the mortgage made further advances to her.

In October, 1898, the society heard for the first time that the plaintiff was a minor. Thereupon they discontinued their advances, took possession of the property, and expended about £268. in completing the buildings, which they then let, and collected the rents. At the time when the society took possession the amount due to them for advances under the mortgage was £1070., of which £250. had been applied in the purchase of the property, and the balance had been expended on the buildings.

In March, 1899, the plaintiff attained her majority, and shortly afterwards she by her solicitor applied to the society claiming the property and repudiating the mortgage. The society declined to give up possession; and in April, 1899, the plaintiff commenced this action, claiming a declaration that the mortgage was void, and that she was entitled to an order for its delivery up to be cancelled, and for delivery of the title-deeds and possession of the property.

The society by their defence claimed a lien or charge on the property for all their advances, and offered to deliver up possession of it and the title-deeds on payment of what was due to them.

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[22] The words in brackets appear in the statement of the case in [1901] 1 Ch. 88.

At the trial it was admitted that the total amount due to the society, after allowing for rents received by them, was about £1300., and that the then present value of the property was about £1800.

Under the certified rules of the society it was competent for a minor to become a member.

JOYCE, J., held that the purchase and the mortgage formed one transaction, and that the plaintiff could not repudiate one part of the transaction while affirming and taking the benefit of the other part. His Lordship held, therefore, that the plaintiff was not entitled to the property free from the charge of the building society for the money which they had advanced, and he dismissed the action.

The plaintiff appealed.

VAUGHAN WILLIAMS, L. J., read the following judgment:

I cannot agree with the conclusion at which JOYCE, J., has arrived in its entirety. I think that the mortgage deed is void and not binding on the plaintiff. It seems clearly to come within section 1 of the Infants' Relief Act 1874, as being a contract "for the repayment of money lent"; and I cannot regard the transaction of the purchase of the land and the advance of the money for building as all one transaction. The transaction of the purchase was a transaction between the vendor and Mrs. Thurstan, whereas the transaction of the advance of the money was between the building society and Mrs. Thurstan. The former transaction was voidable, and Mrs. Thurstan has affirmed it. The latter was void, so far as the contract to repay is concerned. I think that the advances of money for building stand on a different footing from the £250. paid by the building society for the purchase of the land and the expenses of conveyance. The money advanced for building was simply money lent, and the society has no security except the mortgage, which, in my judgment, is void as a contract for the repayment of money lent; whereas in the transaction of purchase the society acted as the agents of Mrs. Thurstan to carry through the purchase for her, by paying the purchase-money and obtaining a conveyance to her. In my opinion, Mrs. Thurstan could not adopt the act of her agents, and claim to have the title-deeds and conveyance handed over to her by the building society, without repaying to them the purchase-money which they paid to obtain the conveyance; and I think that, without any contract to that effect, the society have a lien or charge on the title-deeds and conveyance for the money which they paid to obtain the property, which Mrs. Thurstan now claims. If Mrs. Thurstan adopts the acts done by the society, she must discharge the cost and indemnify the society against the same.

I thought during the argument that the only security which the building society held for the £250. which they had paid for purchase-money was a lien upon and a right to retain the title-deeds and conveyance until the money had been repaid; but I am satisfied now, after discussing the matter with my brethren, that the society, having paid off the vendor, have a right to the remedies of the vendor—have a right, that is, to enforce the vendor's lien. It is true that the society were not the vendors, but, having paid off the vendor, the society, as against the purchaser, stand in the place of the vendor. It follows, in my judgment, that the plaintiff is entitled to a declaration that the mortgage deed is void and not binding on her, and is entitled to delivery up of the same and to have it cancelled, but is not entitled to have the title-deeds given up discharged from any lien or charge of the society, unless and until she pays to the society the purchase-money which they paid for the land. I think, moreover, that the society are entitled to a declaration that they have a lien or charge on the land for the amount of the purchase-money and expenses, and that, so far as is necessary, the plaintiff is a trustee for them of the land conveyed to her.

[Balance of opinion omitted and opinion of ROMER, L. J., omitted.]

COZENS-HARDY, L. J., read his judgment as follows:

I agree, and I have very little to add. Two contracts have to be considered. The first was a contract for the purchase of the land. This was voidable only, and not void, and has been adopted and confirmed by the plaintiff since she attained twenty-one. Under this contract, and as a legal consequence of it, there arose a vendor's lien for unpaid purchase-money.

The second was a contract for the repayment of money lent and to be lent. This was absolutely void under the statute of 1874, and not capable of confirmation. The defendants are in no better position, and they ought not to be in a worse position, than if the plaintiff had been adult, but the mortgage deed were proved to be forged. Even in that case the defendants would be entitled to stand in the shoes of the vendor to the extent to which their money discharged the vendor's lien; see Brocklesby v. Temperance Permanent Building Society, [1895] A. C. 173, 182. The result is that we must declare that the defendants had a charge for the amount paid by them to the vendor, with interest at 4 per cent.

EARL OF HALSBURY, L. C. My Lords, in this case I cannot doubt that the judgment of the Court of Appeal was right, and I move your Lordships that the appeal be dismissed with costs. I really do not know that I can add anything to what the learned judges in the Court of Appeal have said. The question seems to me to turn entirely upon the Act of 1874. That Act has in terms made the instrument which is put forward by the society as their security and the foundation of their claim absolutely void. The result of that is that there is no such obligation as has been insisted on at the bar against the respondent.

I notice that JOYCE, J., apparently would not have disagreed with that proposition, but he gets out of the application of it by using a phrase which to my mind covers up the weakness of the argument. He says that that which the Court below, and which your Lordships here, are disposed to affirm—the right of the society to stand in the shoes of the vendor because they, as agents for the lady, paid the purchase-money—is a transaction which is not set aside and rendered void by the Act of 1874; and that is true. But then, in order to justify the judgment which he gave entirely against the respondent, he says: "But it is all one transaction, and being all one transaction, and this" (what I have now been describing) "being perfectly valid notwithstanding the Act, the whole claim must be rejected."

My Lords, that seems to me to be covering up in language things which are in their nature distinct. It is not true to say it is one transaction. If it were meant that all the parties contemplated the things that were afterwards done, it is perfectly possible that that is true, although I should doubt whether there is much evidence of it; but I will assume it was so—what then? In order to make it one transaction so as to avoid the vice of infringing the Act of 1874, the transaction you are dealing with must be one which avoids that vice. Now, the transaction is a totally different transaction according to the history of the matters as they occurred. There is one transaction, in which on behalf of the respondent the building society buys from a stranger—I mean a stranger in the legal sense—land which belongs to that stranger. That stranger, at the instance of this society, conveys to this lady that land. Putting your finger upon that part of the transaction, what is there done is an absolutely separate transaction. The parties to it are different, and the nature of the transaction is different—it is a purchase of land. Then in order to build upon that land, in order to make it available for the purpose for which the respondent desires it, money is borrowed from the society, and that money is secured by a mortgage on that which, by the transaction which I have just described, has become the property of the respondent. You cannot help analyzing the transaction for this purpose, and, so far as this part of the money now claimed is concerned, the only thing one can say is that it is money borrowed; it is money borrowed for a particular purpose I agree, but it is money borrowed; and the claim in substance as well as in form is that that money should be repaid. Therefore it is money borrowed by a minor—whether it is secured by a mortgage deed, or whether it is by mere parol, it is money lent by one of the parties to the other, a minor, and now reclaimed from the minor. That is within the express language of the Infants Relief Act; and how it can be suggested that that is the same transaction so as to cure the illegality of that part of it, what I have previously described, I confess I am not able to follow.

Then if one comes to what is the substance of the matter, what can be clearer than that, if the original thing without the mortgage is in itself void, you can neither make it better nor worse by the fact of there being a mortgage, nor can you dismiss the mortgage, which is the only security this society possessed, and say that simply as a member of the society the lady is liable to pay? The answer to that, I think is in a word: There is no necessity for a member of the society to borrow at all. It is not a necessary part of a member's function as a member of the society to borrow; therefore the two Acts of Parliament—the Act legalizing a minor becoming a member, and the Act rendering the transaction of a minor borrowing money and having to repay it absolutely void—are quite reconcilable. The minor might be a member without having any necessity to borrow.

My Lords, under those circumstances it seems to me that there is no answer to the judgment of the Court of Appeal which affirms the subrogated right of the society to be repaid the money which they, standing in the shoes of the vendor, have a right to claim as a lien upon the property conveyed. On the other hand it is hopeless, as it appears to me, to try to get rid of the express language of the statute, which renders the loan, and the mortgage which was the security for the loan, absolutely and entirely void. For these reasons I think the appeal must be dismissed and the judgment appealed from affirmed.

[The opinions of Lord SHAND, Lord DAVEY, and Lord ROBERTSON omitted.]

READY v. PINKHAM.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 351, 63 N. E. 887.)

Bill in equity, filed October 19, 1899, by one claiming under G. Emerson Vaughn and by Vaughn himself, to restrain the defendant from foreclosing a certain mortgage for $1,350 given by Vaughn when a minor.

The cause was heard by Pierce, J., who made a decree granting the injunction prayed for and ordering the cancellation of the mortgage and the release of all claims thereunder. The defendant alleged exceptions.

KNOWLTON, J. The transactions disclosed by this bill of exceptions seem to have been as follows: One Lewis was the owner of a lot of land. He made a contract with one Vaughn to sell him the land and to build a house upon it, for which Vaughn was to pay a certain sum in cash and the balance by a mortgage for $1,350 upon the property. This mortgage was to be given by Vaughn to one Breed, who was to pay the money secured by it to Lewis from time to time, as the work of building went on. A deed from Lewis to Vaughn and a mortgage from Vaughn to Breed were made, both on the same date, and at the same time an assignment was made from Vaughn to Lewis of the money to be furnished by Breed under the mortgage. Vaughn was at that time a minor. Lewis built the house and Breed paid him the money secured by the mortgage. After the house was completed

Vaughn moved into it, and more than five months after he became of full age he conveyed it to the plaintiff, telling him that there was a mortgage upon it which he (Vaughn) did not consider valid, because it was made when he was a minor. The mortgage was assigned by Breed to the defendant, and the plaintiff brings this bill to enjoin the defendant from foreclosing it.

If the contract for the sale of the lot from Lewis to Vaughn included a contract to erect a house upon it which was to be paid for in part by the mortgage to Breed, to secure him for money to be furnished to Lewis as the construction of the building proceeded, the mortgage was no different in legal effect as against Vaughn, from an ordinary mortgage given by a minor in part payment for real estate conveyed to him. It was voidable. If these several agreements were all parts of one transaction, it is of no consequence that the mortgage was made to Breed instead of to Lewis the grantor in the deed. Smith v. McCarty, 119 Mass. 519, 520; Hazelton v. Lesure, 9 Allen, 24; Woodward v. Sartwell, 129 Mass. 210.

If the deed and mortgage back were made at the same time and as parts of the same contract, Vaughn, after becoming of age, could not affirm a part of the contract by retaining and then conveying away the real estate, without ratifying also the other part by which he agreed to pay for it. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Boyden v. Boyden, 9 Metc. 519; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414; Pelletier v. Couture, 148 Mass. 269, 271, 19 N. E. 400, 1 L. R. A. 863; Dana v. Coombs, 6 Greenl. (Me.) 89, 19 Am. Dec. 194; Robbins v. Eaton, 10 N. H. 561; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Van Horn v. Crain, 1 Paige (N. Y.) 455.

The doctrine stated in Gibson v. Soper and in Chandler v. Simmons, ubi supra, that in order to avail himself of his right to avoid a contract a minor is not obliged to put the other party in statu quo, is not applicable to a case like the present, where a minor affirms a contract under which he retains and holds unimpaired, after attaining his majority, all the property covered by it.

The only question of doubt in this case is what construction to put upon the bill of exceptions. The bill appears to be drawn with an intention of presenting all the evidence bearing upon the questions of law, although it does not expressly state that there was no other material testimony. The testimony as to the making of the mortgage comes from Vaughn who was called by the plaintiff, and Lewis who was called by the defendant. There is no contradiction in their testimony, although Vaughn, testifying about the contract in cross-examination, seems to have been an unwilling witness for the defendant. The deed and the mortgage were both dated and signed the same day, and Vaughn gave an affirmative answer to the question, "It was practically one transaction, was it not? You signed this mortgage to Mr. Breed on July 21, 1896, and on that same day Mr. Lewis gave you the deed of the premises July 21, 1896?" He also said, "Lewis agreed to build the house for so much. I gave the mortgage for part payment." Lewis testified that the mortgage was made to him, and that the money was all assigned to him at the time the mortgage was given. He said, "Mr. Vaughn gave Mr. Breed orders to pay the money to me as the work progressed." Both testified that the contract to build the house was made at about the time the deed was given, and as the deed and mortgage were made and delivered at the same time, the contract for the house must have been a part of the previous arrangement. The bill of exceptions shows no finding of fact by the judge, but closes with a statement that he refused to rule as requested, "but did rule that the plaintiff was entitled to maintain said bill." Upon this uncontradicted evidence it is difficult to see how the judge could have failed to find that the deed and mortgage and contract to build the house were parts of one contract, and that the mortgage was given to secure the purchase money of the real estate in the condition in which Lewis agreed to put it. See Sprague v. Brown, 178 Mass. 220, 59 N. E. 631. We are inclined to construe the exceptions as presenting rulings of law on this undisputed evidence, rather than as founded on findings of different facts which nowhere appear.

Exceptions sustained.[23]

IV. CASES IN WHICH THE INFANT'S RIGHT TO DEFEND ON THE GROUND OF INFANCY IS MORE RESTRICTED THAN IN ORDINARY CASES

(A) Necessaries

MAULDIN v. SOUTHERN SHORTHAND & BUSINESS UNIVERSITY.

(Court of Appeals of Georgia, 1908. 3 Ga. App. 800, 60 S. E. 358.)

POWELL, J. Dora Mauldin, of Tunnel Hill, Georgia, a seventeen-year old girl, an orphan, whose whole estate consisted of about $75, came to Atlanta and, over the objection of her guardian, made a contract with the defendant to take a five-months course in stenography for $35, which at her request her guardian paid out of her moneys in his hands. Being disappointed in her expectations of being lodged and cared for by relatives while in Atlanta, she, within about five days, notified the president of the business school of her inability to take the course, and requested a return of her tuition; and this he refused. She brought suit. The defendant set up that her contract provided that the tuition should not be refunded except in certain providential contingencies; and that this contract was for necessaries, and therefore binding on her. A jury on the first trial having found in favor of the defendant, the Supreme Court granted a new trial, because it did not affirmatively appear that the tuition in stenography was a necessary thing for her station in life. See Mauldin v. Southern Shorthand University, 126 Ga. 681, 55 S. E. 922. On the second trial there was a verdict for the plaintiff; but on a certiorari containing substantially the general grounds, the judge of the superior court ordered a new trial; and to this the plaintiff brings error.

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[23] See, also, Dana v. Coombs, 6 Me. 89, 19 Am. Dec. 194 (1829).

In our judgment the determination whether the course in shorthand would have been such a necessary thing as to charge the plaintiff with a liability therefor if she had taken it is not in the case. The right to recover from an infant for necessaries does not arise out of the contract between the parties, but from a quasi-contractual relation arising by operation of law. Keener on Quasi-Contracts, 20. The quality of justice in the law, not the quality of efficacy in the infant's agreement, is the basis of the right of the person who has furnished the necessaries to hold the infant bound therefor. A corollary to the foregoing principle is the well-recognized rule that an infant may repudiate an executory contract for necessaries. The case of Jones v. Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043, is absolutely identical in every essential fact and feature with the case at bar. The plaintiff there, an infant, paid for a scholarship in a business school, but afterwards, concluding not to enjoy the privilege, demanded a return of the money, which was refused; whereupon he sued for it. The court says: "It is elementary law that an infant is bound by implied contract to pay reasonably for necessaries furnished him. The limitations of the rule are plainly indicated by the statement of it. In order that the infant may be bound, all the circumstances must exist essential to raise a promise by implication of law. There must have been furnished him property or something of value, being such as to administer to his necessities. That, obviously, excludes the idea of an infant's being liable upon an executory contract to furnish him necessaries, as has been uniformly held. Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. No liability can be created by an infant for necessaries by express contract. His liability therefor is wholly a creation of law. 1 Parsons on Contracts (9th Ed.) 314, note 1. In view of the foregoing we need not stop to inquire whether an infant may bind himself by implied contract to pay for educational training of the kind promised by appellant, under the rule above stated, since there is no claim that such training was bestowed upon respondent." In Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618, the infant, being a student of Yale College, made an engagement to take lodging from the plaintiff for a year. After holding that the infant's liability for necessaries arises by operation of law and not from any contract he may have attempted to make, and that therefore no executory contract is enforceable against him, the court applied the law to the case, deciding that "an infant may disaffirm his contract for the lease of a room suitable to his needs and situation in life, and is not liable for the rent of the room alleged to have accrued after such disaffirmance and after he has ceased to occupy it, although such period was within the period covered by his contract." See also Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690. The case at bar has therefore been contested over the immaterial question whether tuition in shorthand would have been necessary for the girl in her station of life; for the principle of law above stated concludes the proposition that she should not be held bound on the contract in either event. [Remainder of opinion omitted.]

Judgment reversed.[24]

McCRILLIS v. HOW.

(Superior Court of Judicature of New Hampshire, 1826. 3 N. H. 348.)

Assumpsit upon a note, dated February 21, 1823, for $21.92, made by the defendant and payable to the plaintiff or order. There was also a count upon an account for medicines and visits, as a physician, amounting to $21.92.

The cause was submitted to the decision of the court, upon the following facts. The plaintiff did the services and furnished the medicines, mentioned in the second count; but at the time, the defendant was an infant under the age of twenty-one years. The services so rendered, and the medicines so delivered, were necessary and proper for the defendant. On the 21st February, 1823, the defendant gave to the plaintiff the note, mentioned in the first count, to balance said account; and the plaintiff did balance the account upon his book, by giving credit for the said note. At the time the said note was given, the defendant was an infant, under the age of twenty-one years.

BY THE COURT. It has long been settled, that no action can be maintained against an infant, upon a promissory note.[25] The reason assigned is, because, if the note was held to be valid, the infant would, when the note was in the hands of a bona fide endorsee, be precluded from disputing the original debt. Chitt. on Bills, 24; 1 D. & E. 40, Freeman v. Hurst; 3 Caines (N. Y.) 323, Van Winkle v. Ketcham; 10 Johns. (N. Y.) 33, Swasey v. Adm'r of Vanderheyden; 2 Starkie, 36, Ingledew v. Douglas; Campbell, 552, Williamson v. Watts; Carthew, 160, Williams v. Harrison et al.

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[24] See, also, Peck v. Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

[25] Accord: Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33 (1813); Bouchell v. Clary, 3 Brev. (S. C.) 194 (1815); McMinn v. Richmonds, 6 Yerg. (Tenn.) 9 (1834); Fenton v. White, 4 N. J. Law, 100 (1818); Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759 (1882); Smith v. Crohn (Tex. Civ. App.) 37 S. W. 469 (1896), special contract of infant may not have been a negotiable instrument.

Observe what is said by Wm. A. Keener in an article entitled "Quasi-Contract, Its Nature and Scope," Harvard Law Rev. VII, 72–73.

Similarly, in Deal v. Hanks, 3 McCord (S. C.) 257 (1825), it was held that no suit could be maintained upon a note given by the infant by way of settlement for a tort for which he was liable. It follows from the principal case that where the note given for necessaries comes into the hands of a bona fide purchaser he cannot sue the maker. Morton v. Steward, 5 Ill. App. 533 (1879). And he may sue the endorser without recourse to the maker in the first instance. Henderson v. Fox, 5 Ind. 489 (1854).

The plaintiff then cannot recover upon his first count. But we see no objection to a judgment in his favor, on the second count. A void note, given to balance an account, is no satisfaction. 2 Johns. (N. Y.) 455, 3 Am. Dec. 446, Markle v. Hatfield; 1 Esp. N. P. R. 5; 6 D. & E. 52, Puckford v. Maxwell; 1 N. H. 281, 8 Am. Dec. 68, Wright v. First Crockery Ware Co.; 3 Brod. & Bing. 295; 7 Taunton, 312, Hickling v. Hardy; 4 East, 147.

Judgment for the plaintiff.[26]

DUBOSE v. WHEDDON.

(Court of Appeals of South Carolina, 1827. 4 McCord [S. C.] 221.)

This was a summary process on a note of hand. Plea non assumpsit and infancy. Issue taken on the first, and replication to the second plea, that the note was given for necessaries.

Huger, J., decreed for the defendant on the ground that a note given by an infant, even though for necessaries, is void. Plaintiff appealed.

Curia, per Nott, J. The only question in this case is, whether an infant can bind himself by a promissory note for necessaries. It is a little remarkable that a question of such frequent occurrence should remain to be settled at this day. But I think that although the decisions on the subject are somewhat contradictory, there can be but little doubt on the question now immediately before us. Lord Coke says, that an infant cannot bind himself in a bond with a penalty, even for necessaries. 171–2. From whence it has been inferred that a single bill without a penalty would be good, 3 Co. 172—and it is there said that it has been often so adjudged—see Ayliff v. Archdale, Cro. Eliz. 920; Earle v. Peale, 1 Salk. 387; 3 Bacon, 594–5. And if an infant can bind himself by a single bill, it would seem to follow as a necessary consequence, that he may bind himself by a simple contract. But in the case of Williamson v. Watts, 1 Campbell, 552, in an action of assumpsit on a bill of exchange, where the defendant pleaded infancy, and the plaintiff replied necessaries, Sir James Mansfield said the replication was nonsense; and asks emphatically whether any one ever heard of an infant being liable as acceptor of a bill of exchange. And in the case of Trueman v. Hurst, 1 Term Rep. 40, it was held that an infant was not liable on a negotiable note, nor an account stated, but I cannot see the good sense of the rule, and if I am permitted to use as strong language as Sir James Mansfield I would say it is nonsense to hold that an infant may bind himself by a single bill and not by an account stated.

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[26] A fortiori, where the infant has given no express promise to pay the one furnishing the necessaries can recover the fair value therefor and the burden is upon him to show what the fair value is. Hyman v. Cain, 48 N. C. 111 (1855); Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158 (1830).

Judge Reeve, in his treatise on Domestic Relations, 230–1, lays down the rule, that "when the security is of such a nature that by the rules of law, the consideration cannot be inquired into, then the infant is not liable," from whence it is concluded that he is not liable on a bond or negotiable note after it is negotiated, but that he is liable on a note given for necessaries, provided it be not negotiable and even on a negotiable note while it remains in the hands of the original payee. I have no doubt of the correctness of this conclusion, and that is enough for our present purpose. I can see no reason why he may not be bound by a bond or bill of exchange. It is not true that no inquiry can be made into the consideration. The statutes against usury and gaming are every day set off as defences to actions on bills of exchange and negotiable notes, even in the hands of innocent indorsees. And in addition to those cases, no defense is more common in our courts to an action on bond, than a failure of consideration. If infancy can be pleaded to an action on bond, or on a bill of exchange, why may not a replication that the contract was for necessaries, be allowed? However, it is not my intention to go beyond the case now under consideration. I think the replication ought to have been sustained, and the decree must therefore be reversed.

Decree reversed.[27]

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[27] Accord: Bradley v. Pratt, 23 Vt. 378 (1851); Melton v. Katzenstein (Tex. Civ. App.) 49 S. W. 173 (1899); Guthrie v. Morris, 22 Ark. 411 (1860), case of a bond, the consideration for which could under statute be inquired into; Cooper v. State, 37 Ark. 421 (1881); Earle v. Reed, 10 Metc. (Mass.) 387 (1845), semble, but here there was a count for goods sold and delivered.

Upon reasoning similar to that in the principal case it was held in Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519 (1878), that a note given by an infant to settle a claim for tort for which the infant was liable might be sued on. See, also, Stowers v. Hollis, 83 Ky. 544 (1886), and Gavin v. Burton, 8 Ind. 69 (1856), where infant was sued on an obligation given to the mother of his bastard child to settle a liability imposed by law.

In Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720 (1896), it was held that the bona fide purchaser by way of indorsement before maturity of an insane person's note for necessaries could recover upon the note against the maker to the extent of the value of the necessaries furnished for which the note was given.

Observe, however, that in order to make the infant liable, even to the extent of the fair value of necessaries furnished, the transaction between the infant and the plaintiff must be such as would make a valid contract if both were adults. McIsaac v. Adams, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321 (1906); Dillon v. Bowles, 77 Mo. 603 (1883); Ryan v. Boltz, 48 N. Y. Super. Ct. 152 (1882); Tharp v. Connelly, 48 Mo. App. 59 (1892); Wailing v. Toll, 9 Johns. (N. Y.) 141 (1812).

JOHNSTONE v. MARKS.

(Supreme Court of Judicature, Queen's Bench Division, 1887. L. R. 19 Q. B. D. 509.)

Appeal from the County Court of Westminster.

The action was by the plaintiff, a tailor, against the defendant for the price of clothes supplied. The defence was infancy, to which the plaintiff replied that the goods supplied were necessaries. It was proved at the trial that the goods in question were supplied by the plaintiff to the defendant, and that when they were supplied the defendant was under age. On the issue raised by the reply the solicitor for the defendant proposed to prove by the evidence of the defendant's father that the defendant was sufficiently supplied with clothes at the time of his purchases from the plaintiff. Upon objection by the plaintiff, the judge, on the authority of Ryder v. Wombwell, Law Rep. 3 Ex. 90, held the evidence to be inadmissible.

The judge found that some of the clothes supplied were and that others were not necessaries, and gave a verdict for the plaintiff for the price of those which he held to be necessaries.

Before Lord ESHER, M. R., and LINDLEY and LOPES, L. JJ., sitting as a Divisional Court of the Queen's Bench Division.

Lord ESHER, M. R. I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it. In Ryder v. Wombwell, Law Rep. 4 Ex. 32, the Court of Exchequer Chamber had cases before them which were inconsistent with the view taken in the court below, but, holding as they did that the goods supplied could not possibly be necessaries, there was no occasion for them to decide whether this evidence was relevant. A Divisional Court has since in Barnes v. Toye, 13 Q. B. D. 410, decided that the evidence is relevant and I entirely agree with the decision.

LINDLEY, L. J. I am of the same opinion. The decision of the Court of Exchequer in Ryder v. Wombwell, Law Rep. 3 Ex. 90, is contrary to the current of authority. If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him. The law is in my opinion correctly stated in Barnes v. Toye, 13 Q. B. D. 410.

LOPES, L. J. As one of the judges who decided Barnes v. Toye, 13 Q. B. D. 410, I am, of course, of the same opinion.

THE COURT added that, should the question be raised before them sitting as a division of the Court of Appeal, they would be prepared to give the same decision.

Appeal allowed.[28]

BURGHART v. HALL.

(Court of Exchequer, 1839. 4 Mees & W. 727.)

This was an action by the plaintiff, a tailor, to recover the amount of his bill for uniforms and other clothes supplied by him to the defendant's testator, Captain Nisbett, in his lifetime. The defendants pleaded the infancy of the testator, to which there was a replication that the goods were necessaries. The action was brought under the direction of Lord Chancellor Lyndhurst. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Michaelmas Term, 1837, it appeared that Captain Nisbett was a minor at the time when the clothes were supplied, but it was proved also that he had an allowance of 500*l.* a year, besides his pay as a captain in the Guards. The Lord Chief Baron, in summing up, expressed his opinion that if the infant had an income sufficient to provide him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit; and the jury, acting upon this direction, found a verdict for the defendants.

Erle obtained a rule nisi for a new trial, on the ground of misdirection.

Lord ABINGER, C. B., delivered judgment.—In this case, the rule must be absolute for a new trial. I am now convinced that I laid down the rule of law too rigorously at the trial. Mr. Erle's able argument has satisfied me that a minor is capable by law of entering into a contract, not merely for necessaries for ready money, but into any reasonable contract for necessaries, although he may have an income. I told the jury that he could not, under such circumstances, contract but for ready money. In that direction I certainly went farther than any case has carried the rule. On this ground of misdirection, therefore, there must at all events be a new trial.

Rule absolute.

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[28] Accord: Barnes v. Toye, 13 Q. B. D. 410 (1884); Cook v. Deaton, 14 E. C. L. 478, 3 Car. & P. 114 (1827); Story v. Perry, 19 E. C. L. 508, 4 Car. & P. 526 (1831); Steedman v. Rose, 41 E. C. L. 232, 1 Car. & M. 422 (1842). See, also, Nash v. Inman [1908] 2 K. B. 1; Nicholson v. Wilborn, 13 Ga. 467 (1853); Brent v. Williams, 79 Miss. 355, 30 South. 713 (1901).

The fact that a minor was being maintained at an almshouse did not prevent the charge for his maintenance on voluntarily leaving the almshouse to be cared for by the plaintiff from being a necessary. Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761 (1886).

NICHOLSON v. WILBORN & McWHORTER.

(Supreme Court of Georgia, 1853. 13 Ga. 467.)

Mary A. Nelms, before she intermarried with Duncan L. Nicholson, contracted an account with Wilborn & McWhorter, merchants in the Town of Lumpkin, Stewart County. After her marriage, Wilborn & McWhorter brought their action against Duncan L. Nicholson and his wife, for the amount of the account. To this action the defendants filed the plea of infancy—alleging, that at the time the account was made and at the time the suit was brought, Mrs. Nicholson was an infant.

The Court charged the Jury, if the guardian furnished his ward with an allowance of money, sufficient to supply herself with necessaries suitable to her age and condition in life, still, if it were not made to appear that the money was expended in purchasing such necessaries, the plaintiffs were entitled to recover, if their demand was for necessaries; and that it was incumbent on the defendants to show by proof, that the money was applied in procuring such necessaries by the minor.

To this charge the defendants excepted.

BY THE COURT—NISBET, J. delivering the opinion [only that part of the opinion given which relates to the above charge].

A trader must prove in all cases, not only that the articles furnished are suited to the age and condition of the minor, but, that the minor was not, in fact, supplied from any other quarter. If the minor is supplied from any other quarter—no matter how, or by whom supplied—his supplies are not necessaries, and he cannot recover. He furnishes her, with the burden upon him of proving that the articles furnished are necessary, and are suited to her age and condition. This being the rule, when it turns out in proof that the minor has been furnished with money sufficient to supply her with necessaries, the presumption in law is, that she has been from that fund fully supplied, and the burden rests upon him to negative that presumption, and to the extent, and no farther, that he can show that she has not been supplied, will he be entitled to recover. We think that His Honor erred in charging that, in such case, the plaintiff must recover, unless the defendants could show that the money was applied in procuring the necessary supplies for the minor.

Let the judgment be reversed.[29]

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[29] Accord: Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274 (1853); Brent v. Williams, 79 Miss. 355, 30 South. 713 (1901). But see Parsons v. Keys, 43 Tex. 557 (1875).

BAINBRIDGE v. PICKERING.

(Court of Common Pleas, 1779. 2 Wm. Bl. 1325.)

Davy moved to discharge the defendant on a common appearance, being held to special bail for £30. debt to a milliner, for feathered caps and other ornamental apparel; and it being proved by a copy of the parish register, that the defendant was now under twenty years of age, and the debt was of two years standing, she living all the time with her mother—

Grose shewed for cause, that the Court will not discharge her upon motion, but leave her to plead her infancy, as these things might be necessary for her state and situation in life, of which the jury are the proper judges.

But by GOULD, J. (absente DE GREY, C. J.). If an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes, or other real necessaries of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessaries: for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we should give no countenance to such persons as inveigle young women into extravagance, under the pretext of furnishing them with necessaries, without the previous consent of the parent.

And it is incumbent on a tradesman, before he trusts an infant with what may appear necessaries, to enquire whether he is provided for by his friends. Ford v. Fothergill, Peake, N. P. C. 229. Where the father is sued for necessaries supplied to the son, it is a question for the jury to decide, whether they can infer an authority or assent from the father to the son to order such articles. Baker v. Keen, 2 Stark. 501. Whether they are necessaries, is partly a question of law and partly for the jury. Maddox v. Miller, 1 M. & S. 738. As to the contracts of infants, see Zouch v. Parsons, 1 Wm. Bl. 576, note (h).

BLACKSTONE and NARES, JJ., of the same opinion.

Rule absolute.[30]

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[30] Accord: Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652 (1831); Perrin v. Wilson, 10 Mo. 451 (1847); Guthrie v. Murphy, 4 Watts. (Pa.) 80, 28 Am. Dec. 681 (1835), semble; Smith v. Young, 19 N. C. 26 (1836); Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371 (1874); McKanna v. Merry, 61 Ill. 177 (1871).

GOODMAN v. ALEXANDER.*

(Supreme Court, Appellate Division, First Department, 1898. 28 App. Div. 227, 50 N. Y. Supp. 884.)

McLaughlin, J. The plaintiff brought this action to recover of the defendant, an infant of the age of seven years, the sum of $651.14 and interest thereon. The right to recover was predicated upon the complaint which charged that the plaintiff furnished and supplied, at a time specified, this infant, upon her request and implied promise to pay therefor, board and lodging which was of the value claimed; that the board and lodging thus furnished and supplied were "necessaries," and of a character suited to the position "in life of the defendant." At the trial the complaint was dismissed upon the ground that it did not state facts sufficient to constitute a cause of action. Judgment was entered to this effect, and from that judgment this appeal is taken.

The trial court was right in dismissing the complaint. The facts therein set out do not constitute a cause of action. A father is bound by law to support his minor children, if he be of ability to do so. Furman v. Van Sise, 56 N. Y. 439, 15 Am. Rep. 441; Atchison v. Bruff, 50 Barb. 381. And if the parent has the ability to and is willing to support his minor children, board and lodging furnished by another without his consent are not necessaries within the meaning of the law which renders an infant liable. There is no allegation in the complaint that the father refused or was unable to pay for the board and lodging furnished by the plaintiff. It cannot be that an infant can voluntarily leave the house of her father, who has the ability and is willing to support her, and make a valid contract with another to furnish board and lodging which will be binding upon her. Such a rule would permit an infant to determine for herself the style and manner in which she should live. Board and lodging furnished under such circumstances are not necessaries, and can only become necessaries when the parent or guardian has not the ability or refuses to support her. The plaintiff could not have recovered upon the trial without proving these facts. It was a part of her cause of action, and if she could not recover without proving the facts, then it follows that the complaint did not state a cause of action, because the Code of Civil Procedure (section 481) requires that a party shall set out in his complaint the facts which constitute his cause of action.

The judgment should be affirmed, with costs.

Van Brunt, P. J., and Patterson, O'Brien, and Ingraham, JJ., concurred.

Judgment affirmed, with costs.[31]

[31] But see Watson v. Cross, 2 Duv. (Ky.) 147 (1865).

*This case has been reversed by the Court of Appeals. See 165 N .Y. 289, 59 N. E. 145, 55 L. R. A. 781.

TUPPER v. CADWELL.

(Supreme Judicial Court of Massachusetts, 1847. 12 Metc. 559, 46 Am. Dec. 704.)

Assumpsit on the general counts for labor done and materials furnished in rebuilding and repairing the defendant's house. Plea of the general issue and specification of the defense of infancy. There was evidence tending to show that the defendant's mother owned an undivided one-third of the premises for her life and there was some evidence that she had employed the plaintiff either alone or jointly with the defendant.

The defendant's counsel requested the court to instruct the jury, that if they believed the defendant to be a minor when said work was done and said materials found, he was not liable to pay for them; but the court declined to give this instruction, and charged the jury, that if the mother alone made the contract, the son was not liable; that if the son employed the plaintiff alone, or jointly with the mother, he was not liable, if he was then a minor, unless the work and materials furnished by the plaintiff were actually necessary to prevent immediate serious injury or destruction of the property; that if the repairs and work done by the plaintiff could have been postponed until the next year, or until the defendant's majority, they were not necessaries, and the defendant was not liable; that in passing upon this point, the jury might look to the actual condition in which the property was, at the time when the plaintiff was first employed, and began to work; that if, at this point of time, the roof had been stripped off, the chimneys taken down, and the frame exposed, by other workmen not connected with the plaintiff, and over whom the plaintiff had no control, so as to expose the property to immediate and irremediable injury, then so much of the plaintiff's work and materials as was requisite to prevent this, were necessaries, and if the defendant contracted for them, he was liable.

The jury found a verdict for the plaintiff for $300. Upon being inquired of by the court, they stated that they had found the defendant to be a minor when the work was done, and that the whole of the plaintiff's work and materials were necessary. The defendant excepted to the ruling of the court.[32]

Dewey, J. An infant may make a valid contract for necessaries; and the matter of doubt in the present case is what expenditures are embraced in the term "necessaries." In Co. Lit. 172a, it is said: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The term "necessaries," it is well settled, also embraces necessary articles for the support of his wife and children, if he has such to maintain.[33] The wants to be supplied are, however, personal; either those for the body, as food, clothing, lodging, and the like;[34] or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood.

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[32] Statement abridged.

It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, whether the expenditure, or articles contracted for, were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper, in the particular case; and this may present a question of fact. It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems "necessaries," and unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor, as that is irrelevant.

No authority has been found which, in our opinion, sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated. No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes the proper occasion for the appointment of a guardian, through whose agency such repairs can be made, and, as the law assumes, more judiciously made, than through the agency of the minor. An infant is not liable for goods bought to furnish his shop and to enable him usefully to continue trade, although he keeps a public shop. Whittingham v. Hill, Cro. Jac. 494; Whywall v. Champion, 2 Stra. 1083; 2 Stark. Ev. 726. See also Dilk v. Keighley, 2 Esp. R. 480. In such cases, the law deems the infant incompetent to carry on business, and for that reason holds him not liable for articles furnished him for trade,[35] irrespective of the question whether, in the particular state of his business, the addition to his stock was actually beneficial. That question is not open, in such cases. We think a similar rule prevails as to expenditures for improvements upon the real estate of a minor. The law deems him incompetent to make such contracts; and they not being of the class embraced in the term "necessaries," no legal liability arises for such expenditures, as against the infant personally.

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[33] Cantine v. Phillips, 5 Har. (Del.) 428 (1854); Chapman v. Hughes, 61 Miss. 339 (1883); Price v. Sanders, 60 Ind. 310 (1878); Chapple v. Cooper, 13 L. J. Ex. 286 (1844).

[34] It has been held that a bridal outfit, including a chamber set, was a necessary. Jordon v. Coffield, 70 N. C. 110 (1874); Sams v. Stockton, 14 B. Mon. (Ky.) 232 (1853). Also that a telegram sent by the infant to his parents was a necessary. Western Union Telegraph Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525 (1905).

Where the minor has no guardian, his contract with an attorney for services in securing the minor's estate or claim has usually been regarded as a contract for a necessary. Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151 (1863); Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434 (1879); Crafts v. Carr, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721 (1902); Hanlon v. Wheeler (Tex. Civ. App.) 45 S. W. 821 (1898).

But see Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176 (1896). On the general subject of liability of infants for the services of attorneys at law, see 96 Am. St. Rep. 731–735.

The exceptions being sustained upon this ground, we have not thought it necessary to consider the effect of the former judgment, recovered against Mary Cadwell, for the same repairs.

New trial ordered.

MIDDLEBURY COLLEGE v. CHANDLER.

(Supreme Court of Vermont, 1844. 16 Vt. 683, 42 Am. Dec. 537.)

Book account. The auditor reported that he disallowed the plaintiffs' account on account of the infancy of the defendant at the time the account accrued. The County Court accepted the report of the auditor and rendered judgment for the defendant, to which the plaintiffs excepted.

Royce, J. The report shows that the defendant was sent by his father to become a member of the college, when he can scarcely be said to have arrived at the age of even youthful discretion. And during the first year he was not only supported at college by his father, but a correspondence was carried on between the latter and the president of the college in relation to him. During the second year he was supported by funds received from his father's estate, the officers of college then knowing that his father was dead. It does not appear that any express undertaking of the father to pay the defendant's college bills was ever given, or that any such was ever given by the defendant. Under all these circumstances we are not prepared to say, that any implied promise can legally or justly be raised against the defendant. Whilst an infant is reasonably supplied by his relatives or friends, he cannot be personally charged, even for necessaries. But the decision of the auditor seems not to have proceeded upon this view of the case, nor does the report find whether the original credit was in fact given to the defendant. We are, indeed, left to infer from the alleged ground of his decision, that, in the opinion of the auditor, such a credit ought to be implied from the facts reported. It therefore becomes proper to consider the case, as if the items charged in the plaintiffs' account were actually furnished upon the defendant's express or implied contract to pay.

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[35] Accord: Horstmeyer v. Connors, 56 Mo. App. 115 (1894); Phillips v. Lloyd, 18 R. I. 99, 25 Atl. 909 (1892); West v. Gregg's Adm'r, 1 Grant Cas. (Pa.) 53 (1854). The same rule obtains as to improvements for the infant's real estate. Freeman v. Bridger, 49 N. C. 1, 67 Am. Dec. 258 (1856); Allen v. Lardner, 78 Hun, 603, 29 N. Y. Supp. 213 (1894); Wornock v. Loar, 11 S. W. 438, 11 Ky. Law Rep. 6 (1889); Price v. Jennings, 62 Ind. 111 (1877). And for the insurance of the infant's real estate. N. H. Mutual Fire Ins. Co. v. Noyes, 32 N. H. 345 (1855). And on his life. Simpson v. Prudential Ins. Co. of Am., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (1903).

An infant may bind himself for necessaries. And the reason anciently assigned was, that without this power he might be exposed to perish of want. But though this was the alleged ground on which the infant's obligation was placed, yet the law has never limited its definition of the term necessaries to those things which are strictly essential to the support of life, as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence a good common school education, at the least, is now fully recognized as one of the necessaries for an infant.[36] Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is moreover essential to the intelligent discharge of civil, political, and religious duties.

But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. I would not be understood as making any allusion to professional studies,[37] or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study; for such was the course upon which the defendant professedly entered. Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in community. And we therefore consider that such an education should not be ranked among those necessaries, for which he could, as an infant, render himself absolutely liable by contract.

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[36] Accord: Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780 (1891).

[37] In Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574 (1880), it was held that, under the circumstances of the particular infant, a professional medical education was not a necessary.

Judgment of county court affirmed.[38]

RANDALL v. SWEET.

(Supreme Court of New York, 1845. 1 Denio, 460.)

Assumpsit, tried before Monell, C. J., in August, 1843. The case was this: The plaintiff and defendant were partners in business in the sale of goods. In August, 1841, the partnership was dissolved. The defendant purchased the plaintiff's interest in the concern for $1500, and gave his notes to the plaintiff for the amount, payable at future periods. On one of those notes, for $75, this action was brought. Soon after the dissolution Root & McNaughton presented the plaintiff with an account for his board at two dollars a week, and some other things, amounting altogether to $45.63. The plaintiff requested the defendant to pay the amount to Root & McNaughton, and the defendant did so. The defendant had some further account against the plaintiff, one item being money paid to one Van Name for a pair of boots; and in December, 1841, the plaintiff settled the account, and gave the defendant his note for $50. The defendant proposed to set off the note or the consideration for which it was given against the plaintiff's demand. In answer, the plaintiff proved that he was an infant at the time the money was paid to Root & McNaughton, and at the time the $50 note was given in December following. The judge charged the jury that the defendant could not set off the note, because the plaintiff was an infant at the time it was given; but that he might set off so much of the account as was for necessaries furnished to the defendant. The plaintiff excepted; and the jury found a verdict in his favor for $31.90. The plaintiff moves for a new trial on a bill of exceptions.

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[38] Per Beck, J., in Mauldin v. Southern Shorthand & Business University, 126 Ga. 680, 682-683, 55 S. E. 922, 923 (1906): "But there are many branches of learning in which instruction might be highly useful and advantageous which are not included either in a college or professional education (which most authorities hold not to be a necessary), nor in a common school education (which according to nearly all of the authorities is a necessary); and in those branches of learning, in most cases, it will be found that whether instruction is a necessary or not is a question depending upon the facts and circumstances of the particular case which go to show the state, degree, and condition of life in which the infant is, the validity of whose contract may be under consideration. And such we consider the science or art of stenography. Whether a course in that branch of learning would be a necessary to a young lady seventeen years of age would depend entirely upon that particular infant's condition in life, and the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill."

BY THE COURT—BRONSON, Ch. J. An infant is not answerable for money borrowed, though expended by him for necessaries; nor for money borrowed to buy necessaries, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself, or sees it laid out for necessaries. But where that is done, the infant is answerable for the money, the same as he would have been for the necessaries had they been directly furnished by the lender. Earle v. Peale, 1 Salk. 386, 10 Mod. 67, s. c.; Ellis v. Ellis, 12 Mod. 197, Comb. 482, 3 Salk. 197, 5 Mod. 368, 1 Ld. Raym. 344; s. c.; Macph. Infants, 505, 506. And see Marlow v. Pitefield, 1 P. Wms. 558; Probart v. Knouth, 2 Esp. 472, note. So an infant is liable for money paid to procure his liberation from arrest on execution; and also on mesne process, where the arrest was for necessaries. Clarke v. Leslie, 5 Esp. 28. The case at bar falls within the principle of those where the infant has been held liable. The money was paid at the plaintiff's request, to satisfy a debt which he owed for necessaries. The infancy of the plaintiff would have been no answer to an action by Root & McNaughton; and I think it is no answer to the claim of the defendant.

New trial denied.[39]

DARBY v. BOUCHER.

(Court of Common Bench, 1693. 1 Salk. 279.)

[In assumpsit for money lent out and laid out to the use of the defendant's wife while sole. Upon trial before TREBY, C. J., it was held that evidence of the infancy of the feme at the time of the promise could be given under the general issue. The report continues:]

And in this case there was another question made, which was, One lends an infant money, who employs it in paying for necessaries, whether in that case the infant be liable? And it was held clearly by the Chief Justice, that the infant is not liable; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not by matter ex post facto entitle the plaintiff to an action.[40]

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[39] Accord: Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780 (1891); Clarke v. Leslie, 5 Esp. 28 (1803). So, where the adult actually purchases on his own credit necessaries for the infant, the infant is liable. Swift v. Bennett, 10 Cush. (Mass.) 436 (1852); Smith v. Oliphant, 2 Sandf. (N. Y.) 306 (1849).

[40] Beeler v. Young, 1 Bibb (Ky.) 519 (1809).

MARLOW v. PITFIELD.

(In Chancery, 1719. 1 P. Wms. 558.)

One Pitfield an infant, whose estate was considerable, but consisted chiefly of a reversion after his father's death, having married without his father's consent, was thereupon discarded by him, and forced to take a house for himself and his wife. Not long after this he attained his full age, and having during his infancy borrowed money (which money so borrowed amounted to £130.) and therewith bought some necessaries, made his will, devising his real estate to trustees for the payment of his debts with interest.

The question was, whether the monies actually advanced to the testator Pitfield during his infancy were to be paid within this trust?

His honour the MASTER OF THE ROLLS took time to consider of it, and now gave his opinion that this money actually lent to the testator, though during his infancy, was within the trust and ought to be paid.[41] * * *

Secondly. Though the law be, that if one actually lend money to an infant, even to pay for necessaries, yet as the infant in such case may waste and misapply it, he is therefore not liable, according to the resolution in Salk. 279. It is however otherwise in equity; for if one lends money to an infant to pay a debt for necessaries, and in consequence thereof the infant does pay the debt, here although he may not be liable at law, he must nevertheless be so in equity; because in this case the lender of the money stands in the place of the person paid (vide 1 P. Wms. 483, Harris v. Lee), viz. the creditor for necessaries, and shall recover in equity, as the other should have done at law.

Thirdly. His honour thought that as equity should take care of creditors, so it ought to shew its concern for infants, and not give any encouragement whereby these might be drawn in during their infancy to take up such sums as might ruin them; and therefore had there been in the principal case the least circumstance of fraud, or had the money been advanced to supply the infant's extravagancies, he should have been of a different opinion; but here the principal sum being but £130. and the infant's estate considerable, and he being on his father's displeasure left destitute and obliged to borrow money for his necessary support, it could not be imagined but had the testator been now living, and been asked the question, whether the debts which he had actually and without fraud contracted, should be paid within the trust? he would have said they ought to be paid.

Wherefore considering all circumstances, and particularly since he did not barely desire that his debts should be paid, but with interest also (which is unusual); it was decreed, that this money actually lent as aforesaid, though during the testator's infancy, was within the trust.[42]

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[41] Part of opinion omitted.

(B) *Unclassified*

KETSEY'S CASE.

(Court of King's Bench, 1613. Cro. Jac. 320.)[43]

Debt brought upon a lease for years, for arrears of rent against Richards.

The defendant in bar pleaded infancy at the time of the lease made; whereupon the plaintiff demurred.

The sole question was, Whether a lease made to an infant is void? And it was objected that it should be void, because it might be prejudicial to him, who had not sufficient discretion for the managing of the land; and the rent may be greater than the value of the land.

But THE COURT held it to be voidable only at his election; for if it were for his benefit, it shall be no ways void; but the infant, at his election, may make it void, by refusing and waiving the land before the rent-day comes; for then no action of debt will lie against him. But in the principal case it was not shewed that the rent was of greater value, and the defendant was of full age before the rent-day came:[44] therefore it was adjudged for the plaintiff. V. Shep. Law En. 37. 1 Bro. 120.

NORTH WESTERN RY. CO. v. McMICHAEL.

BIRKENHEAD, L. & C. J. RY. CO. v. PILCHER.

(Court of Exchequer of the Pleas, 1850. 5 Welsb., H. & G. 114.)

Debt. The first count of the declaration stated that the defendant is the holder of ten shares in the said Company and is indebted to the plaintiffs in the sum of £112. 10s., in respect of six calls on each of the said shares.

Plea, that before the making of any of the calls in the declaration mentioned, the defendant applied to the Company to become the holder of ten shares in the Company; and the Company then, in pursuance of the defendant's application, granted the shares in the declaration mentioned, to him as the original and first holder thereof, and then entered his name in the register of shareholders in the Company as the proprietor of the said shares; that when the defendant applied as aforesaid, and when the shares in the declaration mentioned were granted to him and his name entered as aforesaid, and also at the respective times of the making of the calls in the first count mentioned, the defendant was an infant within the age of twenty-one years, to wit, of the age of twenty years. That the defendant has never ratified or confirmed the said application, grant, entry, and proprietorship, or any or either of them, but the same have, and each and every of them hath hitherto always remained, wholly unratified and unconfirmed. That the defendant has not at any time derived any profit, benefit, or advantage whatsoever from the said shares or by reason of his being proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant.—Verification.[45]

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[42] Accord: Price v. Sanders, 60 Ind. 310 (1878). See, also, Beeler v. Young, 1 Bibb (Ky.) 519 (1809). Same holding occurs where the wife, upon leaving her husband by reason of his fault, borrows money to expend in necessaries, and does so expend the money borrowed. Harris v. Lee, 1 P. Wms. 482 (1718).

[43] This case is also reported in Brownlow, 120 (1613), as Ketley's Case, in 2 Bulst. 69 (1613), as Kirton v. Eliott, and in Roll. Abr. 731 (1613), as Kettle v. Eliot.

[44] See, also, Mahon v. O'Ferrall, 10 Ir. Law Rep. 527 (1847); Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429 (1857).

General demurrer, and joinder therein.

PARKE, B. The question to be decided in the case of The North Western Railway Company v. McMichael is, whether the first plea (the second to the second count being identical) contains a good prima facie answer to the declaration. If the effect of a person actually becoming a shareholder in a Railway Company, by original agreement with the Company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessaries, are not binding on the infant at all; and the simple fact that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in Railway Companies, have been held liable to pay calls made whilst they were infants. The Cork and Bandon Railway Company v. Cazenove, 10 Q. B. 935; The Leeds and Thirsk Railway Company v. Fearnley, 4 Exch. 26. They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent (21 Hen. VI, 31 B) in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted (Evelyn v. Chichester, 3 Burr. 1717), unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. Bac. Abr. "Infancy and Age," (I) 5; Co. Litt. 380. This Court accordingly held, in The Newry and Enniskillen Railway Company v. Coombe, 3 Exch. 565, that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of The Leeds and Thirsk Railway Company v. Fearnley, 4 Id. 26, where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that Court, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that all shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the Company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favour of infants and lunatics in statutes containing general words (Stowell v. Lord Zouch, Plowd. 364), though that depends, of course, on the intent of the legislature in each case (see Wilmot's Notes of Opinions and Judgments, p. 194, The Earl of Buckinghamshire v. Drury), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them, against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. See Bac. Abr. "Infancy and Age," (I) 8. The law is clearly laid down in Co. Litt. 2b: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a Railway Company, or other chartered corporation, is not thereby made a holder of real estate: Bligh v. Brent, 2 Y. & C. 268; for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits arising from the land, and other effects of the Company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

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[45] Statement of facts is abridged.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we think the plea in the case of The Birkenhead Railway Company v. Pilcher, which we have to consider with this, bad, notwithstanding the verdict, and therefore are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of The North Western Railway Company v. McMichael contains, besides the averment of infancy at the time of the contracts for the shares, other special facts,—not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. VI, 31 B, where it was held by Newton, J., that, if an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as Ketley's case; Cro. Jac. 320, as Ketsey's case; 2 Bulst. 69, as Kirton v. Eliott; and in Roll. Abr. 731, as Kettle v. Eliot. The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was argued, on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the Court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bac. Abr. "Infancy," (I) 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord Ellenborough, in Baylis v. Dineley, 3 M. & S. [30 E. C. L. R.] 481, intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that, if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and revests it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of Ketley, as reported in Bulstrode, Haughton, J., expressing an opinion, that if the lease was for an acre at £100. per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but Dodderidge said, that if a greater rent was reserved than the land was worth, that then, peradventure, the infant should not be charged. This opinion is more strongly expressed in the report in Brownlow. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obligation? and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the mean time, he ought to be at liberty, or his guardian for him, to get rid of the liability, by showing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed,—at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the Company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

KELLY v. COOTE.

(Court of Common Pleas, Ireland, 1856. 5 Ir. C. L. 469.)

MONAHAN, C. J., delivered the judgment of the Court.

In this case, which comes before the Court upon a demurrer to the defendant's plea, the facts appear to be as follows: The plaintiff sues for rent reserved upon an indenture of lease, alleging that the original lessee died seised of the premises demised, and out of which the rent is sought to be recovered, which he held for lives; that the cestui que vie is still in being, and that the property has descended to the defendant as heir-at-law of the original lessee. To this the answer is, that the defendant, who appears here by guardian, is still an infant under the age of twenty-one years, and that he was so at the time of the descent of the property in question upon him; that he has never entered into possession of the estate, or done any act in relation thereto, and that he is consequently not responsible for any rent that accrued due since the demise of his ancestor. To this plea the plaintiff has demurred, and several cases have been cited in argument. We have looked into the authorities, and it is clear that, upon the demise of the ancestor, the property vested in some way or other in the infant heir. It appears, from the case of Holden v. Smallbrooke, Vaugh. 201, that where there is a demise of land to a man and his heirs, habendum pur autre vie, and the lessee dies during the lifetime of the cestui que vie, the heir will take the land as heir, not in fee-simple, but as a descendible freehold. In the present case there was a similar descent; for the estate did not come to him by purchase, and although it is not an estate in fee-simple, yet we are of opinion that the property vested in the heir as a descendible freehold, and therefore that the landlord is entitled to maintain his action. The legal estate became vested, to all intents and purposes, in the infant heir upon the death of the lessee, and therefore the question is as to his liability. Nothing is clearer than this, that where an infant becomes entitled to property, subject to a certain burden, the obligation to discharge that burden also vests in him. Several authorities have been cited to sustain this proposition; but the late Railway cases are particularly in point, the case in 4 Exch. especially. In that case the Court held that they could not infer from the fact that the party had pleaded by attorney that he had ceased to be an infant, and therefore that the defendant's pleas were bad, as it did not appear by them either that he had originally become a shareholder, or that he had avoided the contract; and therefore that it might be assumed upon the pleading that they came to him by operation of law, or in some other way. So far as personal contracts are concerned, there is no doubt but that they will be void, except they be for necessaries; but in the case that I have alluded to, the Court held that if the infant became owner of the shares by will or devolution of law, he became liable for calls.

This principle appears even more clearly from the decision in The North-Eastern Railway Company v. McMichael, 5 Exch. 114. We are therefore of opinion that the estate in question was cast upon the infant by the mere operation of law, and that until he disclaimed, or got rid of his liability in some other way, he was liable for the rent; and for these reasons, we must allow the demurrer.

Demurrer allowed.

BLAKE v. CONCANNON.

(Superior Courts in Ireland, 1870. 4 Ir. C. L. 323.)

Civil Bill for rent. The facts of the case appear sufficiently from the judgment.

PIGOT, C. B. In this case I decided, in point of fact, at the hearing at the Assizes, that the Defendant, under a letting made to him of the lands in question, in May, 1866, possessed and enjoyed the lands until the 20th of April, 1867; that he was under the age of twenty-one years when the letting was made; and that he still continued an infant on the 20th of April, 1867; that he, on that day, left the possession of the lands; and that, in due time after he had attained his majority (which event occurred shortly after he had left the possession), he repudiated the contract of tenancy, and the tenancy under it; but that in the interval, before he had repudiated, and while he continued in possession and enjoyment of the lands, a gale of the rent sued for became due on the 1st of November, 1866.

Upon these facts I reserved the point, whether, by the repudiation, the Defendant not only became exonerated from liability for the rent, which, if he was liable for it at all, became due on the 1st of May, 1867, but also for that which became due on the 1st of November, 1866, while he continued in possession and enjoyment of the lands.

[The Chief Baron then said that having considered the judgments of Baron Parke in the cases of North-Western Railway Company v. McMichael, and Birkenhead, Lancashire, & Cheshire Junction Railway Company v. Pilcher, 5 Exch. 114, and the case of Ketle v. Elliott, as abstracted in 1 Rolle's Abridgment, 731, he formed the opinion that the defendant, having repudiated the letting in due time after he had attained his majority, and before he was sued for the rent, was entitled on the ground of his infancy and of that repudiation, to defend the action brought by this Civil Bill, but that he had subsequently allowed a reargument of the case. He then continued as follows:]

The result of that argument, and of further consideration of the case, and of the reasoning addressed to me by Mr. Monahan, was, that my opinion was changed.

I think, on consideration, that I gave a force and effect to the language of Baron Parke in the judgment before referred to, and also to the passages cited from Rolle's Abridgment, 731, and from Bacon's Abridgment, Infancy and Age (I) 8, which do not properly belong to them.

In the passage in Rolle's Abridgment, 731, the case of Ketle v. Elliott, decided in the 11 Jac. I, is stated thus: "If a lease for years be made to an infant rendering rent, the rent is arrear, and after the infant comes of full age, and afterwards continues the occupation of the land, this will make him chargeable with the arrears incurred during his infancy. Pasch. 11 Jac. I. Between Ketle and Elliott adjudged."

It appeared to me that Rolle's understanding of the import and effect of that decision was, that the facts, that the infant attained his majority, and afterwards attained his age, and afterwards continued in occupation of the land, constituted the reason which should make him chargeable with the arrears that accrued during his infancy; that is to say, that, but for the continuance of the Defendant in possession after he became of age, he would not have been liable; and that the mere enjoyment of the lands, while the rent was accruing, and until after it had accrued, would not render the infant liable. I am satisfied, on examining the different reports of Ketle v. Elliott, not only that it was not decided there that the occupation and enjoyment of the infant, until after the rent became payable, would not render him liable; but that the Judges, in that case, were of opinion, that such an occupation and enjoyment during infancy would create such liability.

In each of the reports of that case, the question is stated to be, whether a lease made to an infant is void. According to the reports in Cro. Jac. 320, and in 2 Bulstrode, 69, it was held, that the lease is voidable at the election of the infant, and that he may make it void by refusing and waiving the land before the rent day comes, and that "then no action of debt will lie against him." And the same view appears to have been entertained according to the report in Brownlow, 120. There was, according to the reports in Cro. Jac. and in Brownlow, an additional fact—that the infant became of age before the rent became due; so that it may not have been necessary to determine that he would have been liable if he had then remained an infant. But the proposition which I have stated is laid down in clear terms in Cro. Jac. 320, and in Brownlow, 69.

In 4 Bac. Abridgment, 376, Infancy and Age (I) 8, there is the following passage, for which the case reported in the three reports that I have referred to, and also in Rolle's Abridgment, 731, is cited as an authority: "If an infant takes a lease for years of land, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and, by consequence, makes him chargeable with all the arrears incurred during his minority; for, though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance in possession after his full age ratifies and affirms the contract ab initio, and so gives remedy for the arrears of rent incurred from the time of the contract made."

In this passage it is distinctly laid down, that the repudiation of the contract of tenancy, after the lessee has attained his majority, will exonerate him from liability for the arrears of rent which accrued during his minority, and while he was in occupation of the land demised; and in the judgment of Baron Parke, in The North-Western Railway Company v. McMichael, 5 Exch. 125, that very learned Judge, dealing with an action for calls on railway shares vested in an infant, as analogous to an action for rent reserved upon a lease to an infant, appears to have adopted the view of the case so laid down in Bacon's Abridgment, which is referred to by Baron Parke in that judgment. Baron Parke says (page 125): "Under this Act, therefore," the General Railway Act, 8 & 9 Vict. c. 16, § 79, "our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any permanent interest; he is not deprived of the right which the law gives to every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. See Bac. Abridgment, Infancy and Age (I) 8."

It was upon that passage of Bacon's Abridgment, and upon that passage in Baron Parke's judgment, together with the terms in which the case, cited as Ketle v. Elliott, is abstracted in Rolle's Abridgment, 731, that I was induced to form the opinion which I first expressed, as to the Defendant's exemption from liability to the arrears sued for in this Civil Bill, by reason of his repudiation of the contract and tenancy, before he was sued for those arrears. But, on consideration, I find nothing in any of the reports of the case cited in Bacon's Abridgment and Rolle's Abridgment (for they appear all to relate to one and the same decision), indicating any opinion or suggestion of the Court, that when the liability to the rent has once attached upon the infant by the demise to him, and by his occupation of the land until after the rent had accrued due, he not only can, by repudiating the demise, divest himself of the estate in the lands, and free himself from all future liability to the rent; but he can also divest the landlord of a right of suit which had become vested in him when the infant, without waiving or repudiating the tenancy, had continued in occupation until after the rent became due.

That an infant is liable to an action of debt for rent reserved on a lease for years made to him for land which he has occupied and used until after the rent became due, appears from very ancient authority. A case in the Year Book, 21 Hen. VI, 31, b, is referred to by Baron Parke in his judgments in the case in 5 Exchequer, and is also referred to twice in Ketley's Case, Brownlow, 120, in which the following is stated as law by Newton, Justice: "If one lease for a term of years, rendering rent, in fait" (that is, not by matter of record, see Co. Litt. 380) "to an infant within age, if he manures the land, a writ of debt is maintainable against him; the cause is, he has a quid pro quo."

Four cases were decided in the Court of Exchequer in England, in which actions were brought for calls on railway shares, and in each of which actions the Defendant relied upon his having been an infant when he became the holder of the shares. In each of these cases the Court considered the liability of the Defendant with reference to the law affecting infant lessees, and infant purchasers of land. The first was The Newry and Enniskillen Railway Company v. Coombe, 3 Exch. 565. There the Court treated the Defendant as having become the holder of shares only by reason of his having contracted with the Company, and subscribed for the shares; and having been an infant when he did so, and having disaffirmed and repudiated the contract and subscription before the action was brought, he was held exonerated from liability. The next case was The Leeds and Thirsk Railway Company v. Fearnly, 4 Exch. 26. There the Defendant pleaded that, at the time of his becoming and being the holder of the shares, and of the contracting of the debt in respect of the calls, the Defendant was an infant. The plea did not state either that he had become the owner of the shares by reason of a contract with the Company, or that he had repudiated the shares. On demurrer, the Court held him liable. The two next cases were those which I before mentioned: The North-Western Railway Company v. McMichael, and The Birkenhead, Lancashire, & Cheshire Railway Company v. Pilcher; both reported together in 5 Exchequer, 114. In each, the defence was, that the defendant became the holder of the shares while he was an infant. In neither did it appear that he became the holder only by contract with the Company, in neither was there any repudiation. And, although in one of the cases (The North-Western Railway Company v. McMichael), it was alleged in the plea, that the Defendant had derived no profits from the shares, it did not appear that the Defendant was still an infant. The Court, on demurrer to the plea in each case, held the Defendant liable, following their former decision in The Leeds & Thirsk Railway Company v. Fearnly, and a case previously decided in the Court of Queen's Bench—The Cork and Bandon Railway Company v. Cazenove, 11 Jur. 802, 10 Q. B. 935.

[Here the Chief Baron dealt at length with the judgment of Baron Parke in the case of North-Western Railway Company v. McMichael, and thereafter continued as follows:]

Long before those decisions the Court of Exchequer in Ireland (in the year 1829) made a similar decision in Billing v. Osbrey, in an action brought for rent upon a lease by the assignee of the reversion against an infant, sued as assignee of the lessee. The Defendant, by his guardian, pleaded, that at the time the rent became due he was, and at the time of the bringing of the action he still continued, an infant. On demurrer to this plea, the Court held that the infant was answerable for the rent during his enjoyment of the premises. The decision is to be found stated in 1 Furl. Landl. and Ten. 912. It is there stated from a manuscript note of the learned author, whose well-known care and accuracy may be fully relied on.

Two cases have been more recently decided in this country: Mahon v. O'Ferrall, 10 Ir. C. L. 527, and Kelly v. Coote, 5 Ir. C. L. 469, 2 Ir. Jur. N. S. 195. In each of these cases (as in that cited by Mr. Furlong), the Defendant was sued, as assignee of a lease, for rent reserved in it; and pleaded, as his defence, that he was an infant when the rent accrued. In each, the liability of the infant was affirmed. But there was not in any of them a repudiation of the estate or tenancy in respect of which the Defendant was sued, and which, upon the record, was treated as having vested in him.

Upon a review of all the authorities, and I am not aware of any others materially affecting the question arising on this Civil Bill, I am satisfied that I was wrong in forming the opinion, which I did reluctantly, that, upon the view which I at first took of the passages in Bacon's Abridgment and in Rolle's Abridgment of the case referred to, and of the judgments of Baron Parke, in 5 Exchequer, the Respondent, the Defendant in the Civil Bill, was discharged from liability to the first gale of rent.

It appears to me now, upon a consideration of the grounds on which an infant is held to be liable where, by the authorities to which I have referred, his liability is established, if he does not waive or repudiate the tenancy and the land, that he ought to be held bound by that liability when it has been once attached to the payment of the rent which accrued while he has occupied, and before he has repudiated. He is not, in an action of debt for the rent, held liable upon the contract of tenancy alone. His liability arises from his occupation and enjoyment of the land, under the tenancy so created. If his liability arose from the contract alone, the repudiation of the contract, by annulling it, would annul its obligations, which would then exist only by reason of the contract. But the infant, though he can repudiate the contract of demise, and the tenancy under it, and can so revest the land in the landlord, cannot repudiate an occupation and enjoyment which are past, or restore to the landlord what he has lost by that occupation and enjoyment of the infant. The reason given by Justice Newton, in 21 Hen. VI, 31, b, lies at the root of the infant's liability: "He has had a quid pro quo." Though quaintly expressed, it is a reason sanctioned by common sense, and in accordance with plain justice. The infant owes the rent, because he has an equivalent in the occupation and enjoyment of the lands. The authorities to which I have referred appear to me sufficiently to indicate that, if the infant does not avoid the tenancy under which he occupies before the rent becomes due, the mere fact of infancy constitutes no defence. If, therefore, he continues so to occupy without repudiation, the landlord, on the accruing of the rent, has a vested right of suit against the infant for the rent which has so accrued. I cannot, on consideration, hold that such vested right can be divested by the mere repudiation of the infant, without a direct decision, or some unequivocal and acknowledged authority, sustained by general acquiescence or clear analogy of law. I have found none. The dictum of Baron Parke, in 5 Exchequer, 125, must be regarded with all the respect due to everything that fell from that eminent Judge. But it was necessary for the decision of the case before him; and it was manifestly founded on the passage in Bac. Abr. Infancy and Age, (I) 8, or was influenced by that passage. And I have shown that the proposition in Bacon's Abridgment, which is there contained, and which appears to have been thus adopted by Baron Parke, was not warranted by the authorities cited in support of it.

On the whole, I am of opinion that the Respondent, the Defendant in the Civil Bill, was, and is, liable for the first gale of rent, but is not liable for the second; that the dismiss should be reversed, and that there should be a decree for the amount of the first gale.[46]

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[46] The remainder of the opinion is omitted.

But see Lempriere v. Lange, L. R. 12 Ch. Div. 675 (1879); Peck v. Cain, 27 Tex. Civ. App. 38, 63 S. W. 178 (1901).

An infant who marries is liable for his wife's antenuptial debts. Roach v. Quick, 9 Wend. (N. Y.) 238 (1832); Butler v. Breck, 48 Mass. 164, 39 Am. Dec. 768 (1843); Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258 (1853).

In Watson v. Cross, 2 Duv. (Ky.) 147 (1865), it was held that an innkeeper could obtain judgment against an infant for the price of the infant's lodging, though the same was not a necessary.

People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272 (1847). It was held that where an infant in bastardy proceedings gave bond to escape arrest, as required by law, he was liable upon it. The same holding has been made where the infant gave a bond to dissolve an attachment. Sanger v. Hibbard, 2 Ind. T. 547, 53 S. W. 330 (1899). So, in People v. Mullin, 25 Wend. (N. Y.) 698 (1840), it was held that an infant imprisoned on an execution in an action of assault and battery was entitled to a discharge upon assigning his property, and that such assignment was valid notwithstanding his minority. But see Defries v. Davies, 3 Dowl. 629 (1835).

NOTE ON INFANTS' CONTRACTS OF MARRIAGE.—At common law the age of consent was fixed at 14 in males and 12 in females. 1 Bishop, Marriage, Divorce and Separation, § 568. A marriage contract after the parties have reached the age of consent was valid and binding between them. Where both parties to the marriage were over 7 and one or both under the age of consent, the marriage was subject to be avoided by either after both reached the age of consent. 1 Bishop, Marriage, Divorce and Separation, § 573. And perhaps when either reached the age of consent and until both reached the age of consent. 1 Bishop, Marriage, Divorce and Separation, § 575. Unless a statute clearly requires the contrary, the marriage before the age of consent is reached is valid till avoided. State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899). Living together as man and wife after both reach the age of consent will constitute a ratification of the marriage, and deprive each of the power to avoid it. Koonce v. Wallace, 52 N. C. 194 (1859). When either party to a marriage is under 7, the marriage is said to be a mere nullity. 1 Bishop, Marriage, Divorce and Separation, § 571.

SECTION 2.—RIGHT OF THE INFANT TO DISAFFIRM CONTRACTS OR CONVEYANCES AND RECOVER THE CONSIDERATION

I. How Far Infant is Precluded from Recovering the Consideration Until After He Attains His Majority

STAFFORD v. ROOF.

(Court for the Correction of Errors of the State of New York, 1827. 9 Cow. 626.)

Trover for a horse. On the trial it appeared that the plaintiff while an infant sold the horse to the defendant. The defendant paid the price and the plaintiff was still an infant.

The defendant moved for a non-suit on the ground, among others, that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled. The court charged that the plaintiff below had a right to bring his action while yet an infant. To this ruling and charge the defendant excepted. Verdict and judgment for the plaintiff. The defendant brought error to the Supreme Court, which reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Error was brought to the Court for the Correction of Errors.[47]

Jones, Chancellor, said, it is true in general that the deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

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[47] Statement of facts abridged.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land;[48] a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of Zouch v. Parsons, 3 Burr. 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time;[49] but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him,[50] has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Beside, in this case the infant had a general guardian. It may well be doubted whether he could make any contract of sale which should bind him, for any purpose, during his wardship.

[Other opinions omitted.]

By a majority vote the judgment of the Supreme Court was reversed.[51]

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[48] Irvine v. Irvine, 5 Minn. 61, Gil. 44 (1861); Cummings v. Powell, 8 Tex. 80 (1852); Welch v. Bunce, 83 Ind. 382 (1882); Doe v. Leggett, 53 N. C. 425 (1862); McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418 (1882). Where the infant executes a mortgage to secure his necessaries, there can be no foreclosure of the mortgage during his infancy. Watson v. Ruderman, 79 Conn. 687, 66 Atl. 515 (1907); Schneider v. Staihr, 20 Mo. 269 (1855).

[49] Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285 (1837); Cummings v. Powell, 8 Tex. 80 (1852); Matthewson v. Johnson, 1 Hoff. Ch. 560 (1840).

[50] But see Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134 (1816), and Crymes v. Day, 1 Bailey (S. C.) 320 (1829).

[51] Accord: Towle v. Dresser, 73 Me. 252 (1882). Contra: Lansing v. Michigan Cent. R. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567 (1901). A conveyance of an infant's land by his guardian during his minority cannot amount to a disaffirmance. Shreeves v. Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396 (1904). But if the infant, after coming of age, is under some further disability, and has a guardian or conservator, it seems that such guardian or conservator can exercise the infant's privilege for him

EDGERTON v. WOLF.

(Supreme Judicial Court of Massachusetts, 1856. 6 Gray, 453.)

Tort for the conversion of a horse. At the trial it appeared that the defendant Wolf was a minor, and after purchasing the horse from the plaintiff had returned it to the plaintiff, and had thereafter taken the horse from the plaintiff and sold it. The other defendant, Crafts, subsequently had possession of the horse. The sale by the infant and the possession of Crafts, were the acts of conversion complained of.

The defendants contended that if the sale from the plaintiff to Wolf was absolute it vested the property in Wolf, and a re-sale or return of it by him to the plaintiff, even if voluntarily made, was a voidable act and was avoided by Wolf's re-taking the property and selling it. But the court refused so to rule and instructed the jury "that, if Wolf had the property of the plaintiff, and afterwards voluntarily returned it to him, intending to give up all his interest in it to him, and the plaintiff accepted and took possession of the property, such surrender would restore the title to the plaintiff, and the plaintiff could not afterwards lawfully retake the property and sell it." The defendant excepted to the charge and the jury returned a verdict for the plaintiff.[52]

DEWEY, J. [after deciding other questions, continued:]

3. The remaining exception is to the ruling of the court that, if Wolf received the property of the plaintiff under a contract of sale, but afterwards voluntarily returned it to the plaintiff, intending to give up all his interest in it, and the plaintiff accepted it, such surrender would restore the title to the plaintiff, and Wolf could not afterwards lawfully retake the property and sell it. Looking at the precise state of facts as developed in this case, we have no doubt of the correctness of the ruling. Wolf, a minor, had, as he alleged, bought the horse of the plaintiff; but the contract was that of a minor, and so voidable at his election. This he might do as well against, as with the consent of the plaintiff. The case finds that he did thus voluntarily return the horse to the plaintiff, intending to give up all his interest in the property. The case is none the worse for the plaintiff, because he assented to this act of avoidance and return of the property by Wolf. The sale, which was voidable, was thus avoided by the infant, and all the rights of the vendor revested in him. Wolf had thus effectually availed himself of any privilege which attached to his minority, and the contract was no longer in force. With the surren-

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and avoid the infant's deed. Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117 (1867). A married woman infant, after coming of age and being still married, can disaffirm and recover the consideration. Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409 (1860); Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263 (1882); Sims v. Smith, 86 Ind. 577 (1882).

[52] Statement of facts abridged.

der of the property to the plaintiff, intending to give up all his interest in it, he ceased to have any right over the property, and could not retake the same against the will of the plaintiff.

Exceptions overruled as to Wolf.[53]

II. ACTS OF INFANTS NECESSARY OR APPROPRIATE TO DIVEST THE TITLE OF THE ADULT OR ENABLE THE INFANT TO RECOVER THE CONSIDERATION—DISAFFIRMANCE

HARRIS v. CANNON.

(Supreme Court of Georgia, 1849. 6 Ga. 382.)

This was an action of ejectment, brought on the several demises of Cannon and Moses Sinquefield, to recover a lot of land situated in the County of Meriwether.

On the trial, the plaintiff offered in evidence a grant from the State of Georgia to Cannon, for the premises in dispute, and a deed from Cannon to Sinquefield, bearing date on the 22d November, 1845, and proved by a witness the possession of Harris, at the commencement of the suit, and during the year 1845, and continuously up to the trial of the cause, and closed.

The defendant introduced a deed, executed by Cannon to one Griffin, on the 11th February, 1841, and a deed from Griffin to the defendant, dated on the 2d of June, 1841.

The plaintiff then offered the testimony of a witness, taken by commission, to prove that, at the time Cannon made the deed to Griffin, he was a minor; to which the defendant objected, on the ground that the plaintiff had shown title out of Cannon, and that Cannon's infancy was a personal privilege, of which plaintiff could not avail himself.

The Court overruled the objection, and admitted the evidence, to which decision defendant excepted. Judgment for the plaintiff.

BY THE COURT—LUMPKIN, J. delivering the opinion.

1. The first point presented in the record is, could Sinquefield, the grantee of Cannon, take advantage of the infancy of the latter, in order to set aside the deed from Cannon to Griffin, made in 1841, and under which Harris, the defendant claims? There is much contradictory authority upon this vexed question. The dictum is to be met with every

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[53] Accord: Skinner v. Young, 106 Mo. App. 615, 81 S. W. 464 (1904). See, also, Pippen v. Mutual Ben. Life Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505 (1902). A fortiori, where the infant disaffirms his deed of conveyance after coming of age, he cannot in turn disaffirm the disaffirmance. Doe v. Woodruffe, 7 U. C. Q. B. 332 (1850); McCarthy v. Woodstock, 92 Ala. 463, 8 South. 417, 12 L. R. A. 136 (1890).

where in the Digests and Text Books, that infancy is a personal privilege, of which no one can take advantage but the infant himself. The difficulty is, in the application of this abstract principle.

In Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101, a minor had received a promissory note, in payment of his labors, in the employment of the maker of the note, and had indorsed the same to a third person, for a valuable consideration, the indorsee knowing the indorser to be under age; and afterwards, the father of the minor received the amount of the maker, in discharge of the note, both the father and the maker knowing of the indorsement; the indorsee was allowed to recover judgment against the maker, and Parker, C. J., in delivering the opinion of the Court, said, "If an action should be brought against the infant, as indorser, for the default of payment by the promisor, without doubt, he may avoid such action by a plea of infancy; but that is a personal privilege which none but himself can set up, in avoidance of any contract in his favor."

The same eminent Judge, in delivering the opinion of the Court, in Worcester v. Eaton, 13 Mass. 375, 7 Am. Dec. 155, remarked that, "it is a general principle, that when infancy is set up in defence, against a deed, it must be in the form of a special plea, infancy not making a deed void, but voidable; and yet, it is held, that an infant, who has conveyed his land by deed of feoffment, or by bargain and sale enrolled, may, by entry, either within age or after, if he has not assented to the conveyance, after coming of age, revest the title in himself. The requisition of the plea of infancy, is undoubtedly applicable only to executory contracts." He continues: "Until a deed so made is avoided, no subsequent conveyance by the grantor can be good, because he would not be seized of the land; and none but himself or his heirs can set up a right to avoid a deed for infancy or duress, these being matters in defence which he may waive, if he see fit, so that the title will remain good to the grantee, by virtue of such deed, until the grantor shall lawfully disaffirm it. He can do it only by entry, but having entered, his subsequent deed, accompanied by proof of facts, tending to avoid the first, will convey a title."

The case of Jackson v. Carpenter, 11 Johns. (N. Y.) 539, is an authority directly in support of the judgment below. An infant, in 1784, conveyed lands in the military tract, and afterwards, in 1794, having arrived at full age, conveyed the same lands to another person, and such conveyance was registered. It was held, that the lands being waste and uncultivated, he was not concluded by the lapse of time; and that an entry was not necessary to avoid the former deed, executed by him during his infancy, but that this deed, not being a feoffment, might be avoided by one of the same nature and equal notoriety.

And the same doctrine was reiterated to the fullest extent, in Jackson v. Burchin, 14 Johns. (N. Y.) 124, where the Supreme Court held, that a person having conveyed land, when an infant, may avoid his grant, by the same solemnity with which he made it, as if it were a feoffment with livery, by a subsequent feoffment and livery; if a bargain and sale, by a subsequent bargain and sale.

Other adjudications are to be found in New York, in corroboration of this doctrine.

The same point underwent the most elaborate examination in Hoyle v. Stowe, 19 N. C. 320. Burton & Badger argued the question in behalf of the lessor of the plaintiff, and Caldwell for the defendant. And the Supreme Court held, Ruffin, C. J., delivering the opinion, that a deed of bargain and sale, made by an infant, is avoided, by his executing, upon his arrival at full age, another deed of the same kind, and for the same land, to a different person.

So, also, in McGill v. Woodward, 3 Brev. (S. C.) 401, the Court, in specifying the various ways by which an infant may disavow his intention of carrying into effect a contract made during infancy, say, that he may enter upon lands sold or conveyed by him, when under age; or he may, when he comes of age, convey the same land to another.

Chancellor Kent cites the cases of Jackson and Carpenter, and Jackson and Burchin, apparently, with approbation. He observes, that for an infant to disaffirm the voidable deed of his infancy, which was by deed of bargain and sale, by an act equally solemn after he becomes of age, is the usual and suitable course, when the infant does not mean to stand by his contract. 2 Kent's Com. (5th Ed.) 238.

And Mr. Justice Story, in Tucker v. Moreland, 10 Pet. 59, 9 L. Ed. 345, after thoroughly investigating this principle, declares, that the two decisions in 11 and 14 Johnson, proceeded upon principles which were in perfect coincidence with the Common Law.

I have found no case in the English Reports, directly in point. That of Frost v. Wolverton, in C. B. Strange's R. 94, is most nearly analogous. An infant covenanted to levy a fine, by such a time, to such uses. Before the time he came of age; then the fine was levied; and by another deed, made at full age, he declared it to be to other uses. The Court held, that the last deed should be that which should lead the uses.

Upon the general principle, therefore, I am strongly inclined to think, that the Court below was right; and it only remains to inquire whether there be anything in the particular facts of this case, to withdraw it from the operation of the rule.

2. In Tucker v. Moreland, the infant had never been out of possession.

In Jackson v. Carpenter, the lands in dispute were waste and uncultivated. Yates, Justice, in delivering the opinion, adverts to that fact, remarking, that the rules, as to proceedings in ejectment, for a vacant possession, in England, do not apply to the new or unsettled lands of this country; and that it might with equal propriety be said, that the doctrine of actual entry to avoid a deed given by an infant for new and unsettled lands, is equally inapplicable, and ought to be insisted on only so far as it comports with the principles which gave rise to its introduction.

And in Jackson v. Burchin, Judge Spencer, after maintaining with his usual ability, the doctrine already quoted, viz.: that the infant can manifest his dissent in the same way and manner by which he first assented to convey, says: "The law does not require idle and non-essential ceremonies; and it would be idle to require an entry on the premises, in 1795, when, not only this lot, but the whole country in which it was situated, was almost a wilderness. The second deed to the lessors, was neither an act of maintenance nor of fraud, admitting that they knew of the deed to Newkirk, (the purchaser during the infancy.) I will not say that it might not have been an act of maintenance, had Newkirk been in possession of the lot, and holding under the first deed, but he was not."

In 1837, this point, with the qualification to which these cases refer, came directly before the Supreme Court of New York, in Bool & Wife v. Mix, 17 Wend. 119, 31 Am. Dec. 285, and the following propositions were there affirmed:

(1) That a deed of bargain and sale, made by an infant, is like a feoffment, with livery of seizin, voidable only, and not absolutely void; and it seems, say the Court, that the rule is universal, that all deeds or instruments, under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority—they are void.

(2) That a deed of lands, executed by an infant, cannot be avoided till he come of age, though he may enter and take the profits in the meantime; but it seems a sale and manual delivery of chattels, by an infant, may be avoided while under age.

(3) Before suit brought for the recovery of possession of lands conveyed in infancy, the party must make an entry upon the land, and execute a second deed to a third person, or do some other act of equal notoriety, in disaffirmance of the first deed—such as demanding possession, or giving notice of an intention not to be bound by the first deed, or an action cannot be sustained.

(4) If there be a feoffment with livery, it may be avoided by entry, or by writ dum fuit infra ætatem. If a deed of bargain and sale be executed, it may be avoided by another deed of bargain and sale, made to a third person, without entry, in case the land be vacant and uncultivated; but in all other cases, there must be an actual entry, for the express purpose of disaffirming the deed.

(5) If, when the second deed be executed, the land be holden adversely to the infant, it seems that the second deed will not amount to a revocation of the first conveyance.

And in Roberts v. Wiggins, 1 N. H. 73, 8 Am. Dec. 50, it was held, that if the infant was out of possession, he should enter, and if in possession, should explicitly evince his intention to defeat the conveyance.

Admit, then, the general rule to be as laid down by Lord Mansfield, (3 Burr. 1804,) and Shepherd, in his Touchstone, (233,) that all gifts, grants or deeds, made by infants, by matter in deed or writing, which do take effect by delivery of his hand are voidable by himself, his heirs and his privies in estate—still, it may be insisted, that this only applies where the land is vacant, or in possession of the infant, or those claiming under him.

But it is otherwise in this case. Harris, the defendant in ejectment, who bought of Griffin, the grantee of Cannon, the infant, continued in possession of the premises in controversy, during the year 1845, and down to the present time. The deed by Cannon to Sinquefield, is dated 22d Nov. 1845. It was made, therefore, while Harris held adversely to Cannon. It does not appear what time had elapsed from the period when Cannon had attained to majority, and the execution of the second conveyance. In contracts voidable only, by an infant, on coming of age, he is bound to give notice of disaffirmance, within a reasonable time, especially where the first grantee is in possession; otherwise, a confirmation of the act of infancy may be justly inferred. Sinquefield's deed being void, then, as against the act forbidding the sale of pretended titles, how can Harris be treated as a trespasser, and subjected to costs and mesne profits, until some act of disaffirmance by Cannon? Here, there has not only been no entry upon the land, but setting aside Sinquefield's deed for maintenance, Cannon has done no act, whatever, to disaffirm the first conveyance. He has not even demanded possession of Harris, or given him notice that he did not intend to be bound by his first deed to Griffin. This, says Mr. Justice Bronson, is the only way in which the Courts can carry out the doctrine, that the deed of an infant is voidable only, and not void. Although the title of the defendant may be defeated, yet, so long as the deed remains unrevoked, he has the legal seizin of the land, and cannot be sued as a trespasser. It is little better than a contradiction in terms, to say that a man who has the rightful possession of lands, can be treated as a wrong-doer. Bool v. Mix, 17 Wend. 136, 31 Am. Dec. 285. [Balance of opinion omitted.]

The plaintiff in error is entitled to judgment of reversal and it is accordingly awarded.[54]

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[54] Accord: Murray v. Shanklin, 20 N. C. 431 (1839); Riggs v. Fisk, 64 Ind. 100 (1877), post, p. 262.

A fortiori, the bringing of the suit was not a disaffirmance. Clawson v. Doe d. Moore, 5 Blackf. (Ind.) 300 (1840); Doe d. Moore v. Abernathy, 7 Blackf. (Ind.) 442 (1845); Wallace's Lessee v. Lewis, 4 Har. (Del.) 75 (1843); Tomczek v. Wieser, 58 Misc. Rep. 46, 108 N. Y. Supp. 784 (1908).

CRESINGER v. WELCH'S LESSEE.

(Supreme Court of Ohio, 1846. 15 Ohio, 156, 45 Am. Dec. 565.)

Ejectment. Trial by jury. Verdict for the plaintiff, now defendant in error, and judgment accordingly. It appeared from the bill of exceptions that the plaintiff supported his title by a conveyance from Cyrus C. Lupton and William H. Lupton, dated April 15th, 1843. The grantors in said deed were over 21 years of age at that date. The defendant supported his possession and title by a deed from the same grantors, dated September 20th, 1832. The said grantors were not of age at that date. The defendant and those from whom he claimed, had been in possession and cultivated said land from the 20th day of September, 1832, and until after the execution of the deed of April 15th, 1843. There was no evidence of any act or expression by Cyrus and William, or either of them, disaffirming their deed of 1832 before the execution of the deed of 1843, nor of any claim or demand of possession, nor of any entry on the land or notice to the tenants prior to the beginning of this suit and service of declaration in this cause. Certain charges and refusal to charge, to which exceptions were taken by the defendant, appear in the opinion of the court.

HITCHCOCK, J.[55] * * * 2. The court were next asked to charge the jury, "that the purchase by Welch, and receiving a deed from persons out of possession of lands in the actual adverse possession of persons claiming title, is an act of champerty and maintenance, illegal and void."

This instruction the court refused, and charged that such was not the law.

The question here presented is not one which now comes before the court for the first time. It is well known that, in England, a sale and conveyance of land by a person out of possession of land, the same lands at the time being in possession of another, claiming title, would be void, as being against the policy of the law. Whether this is a principle of the common law, or whether it is based upon some statute, is a question which has been much controverted. But this is a matter of little consequence, so long as such is the law. In many, probably in most of the states of this Union, the same principle prevails; but in this state the decisions have, from the earliest period of our judicial history, been different, and such sales and conveyances have been held to be valid. This identical question was before this court in the case of Hall et al. v. Ashby et al., 9 Ohio, 96, 34 Am. Dec. 424; and the title acquired under such circumstances was held to be good. The case referred to is the first brought before the court in bank, in which this question was agitated, and the decision was merely in affirmance of what was understood to be the rule of law, as established by frequent determinations on the circuit. Now, I have no hesitation in saying that, in my opinion, the rule contended for by plaintiff's counsel would be beneficial, and highly conducive to the public interest. It would prevent the practice of purchasing doubtful titles. It might interfere with the interest of keen-sighted speculators, who make it a business to hunt up and purchase in such titles, but it could do no injury to the honest man. But although such is my opinion, still, acting in a judicial capacity, I can not consent to change the rule. Such change would interfere with a multitude of land titles heretofore acquired, and acquired, too, with a knowledge of the law as expounded by the court. But there is a body which can apply a remedy which shall operate hereafter; that body is the general assembly. And to me it is a matter of surprise that we have not an act upon our statute books, declaring void sales made under the circumstances referred to by counsel in their second request to the court. But until some statute of the kind is enacted, we feel ourselves bound by the law as heretofore settled.

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[55] Statement of facts abridged, and part of opinion relating to other points omitted.

3 and 4. The third and fourth instructions requested of the court, were, in substance, that the execution by Cyrus C. Lupton and William H. Lupton, of the deed to the defendant in error, did not, on their part, amount to a disaffirmance of the former deed to Kline, by them executed while infants. This the court refused to do, and held that such was not the law.

Much has been said in the books with respect to the deeds of infants conveying land, whether they were void or merely voidable. The better opinion, as we believe, is, that they are merely voidable; and it was so held in the case of Drake and Wife v. Ramsey et al., 5 Ohio, 251. Such being the law, the deed of an infant will hold good until some act has been done by him to avoid it, although there has been no express act of affirmance after his arrival at full age. But what the act of disaffirmance shall be, is a matter of more doubt. If it be one of equal solemnity with the original act of conveyance, it would seem to be sufficient. Thus, in England, if a feoffment be made by an infant, he can only avoid it by entry. He must be in possession in order to make the feoffment; for that is not done without livery of seizin. He must then again enter to avoid the feoffment; and perhaps this alone would not be sufficient. But in this country, and especially in this state, this mode of conveyance is not adopted. Lands here are conveyed by deed of bargain and sale, and deeds of other descriptions. Livery of seizin is not known in practice, and is entirely unnecessary.

In the case of Drake and Wife v. Ramsey et al., before referred to, the judge, in delivering the opinion of the court, says: "Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant; but I can not find it to be expressly decided, except in cases of feoffments, where a peculiar feudal principle renders it necessary. We believe that an entry, suit, or action, a subsequent conveyance, an effort to restore the parties to their original condition, or any act unequivocally manifesting the intention, would render the evidence effectual," etc. It is said, however, that this question did not properly arise in that case, and, therefore, that this dictum of the court can not be relied upon as authority. It was the deliberate opinion of the court, in a case where one of the principal questions was, what act would amount to the avoidance or disaffirmance of a deed executed by an infant. True, the act relied upon in that case, and which was held to be sufficient, was the commencement of an action of ejectment. That a subsequent conveyance would amount to a disaffirmance, has been decided in the Supreme Court of New York and of the United States. Jackson v. Carpenter, 11 Johns. 541; Jackson v. Burchin, 14 Johns. 128; Tucker v. Moreland, 10 Pet. 59, 9 L. Ed. 345. In fact, I can not well conceive what would be a more decisive act of disaffirmance than the conveyance of the same land to another person. It would be conclusive evidence that the person making such conveyance, did not intend to be bound by his deed made in infancy. * * *

Judgment affirmed.[56]

BIRCHARD, J. (dissenting). The deed of a minor is universally held voidable, not absolutely void. Infancy is a personal privilege and can be taken advantage of only by the infant after arriving at years of maturity. He must do some act in avoidance of his deed, before the person occupying lands as the rightful owner, having entered under the deed, can be put in the wrong, and proceeded against as a trespasser. This position is not denied. It is admitted. Cresinger, and those under whom he claimed, had held and improved the land in their own right, as lawful owners, under the deed of the Luptons, executed during minority; and no act or movement had been made by them to disaffirm the deed, for near ten years. Welch, seeking to speculate, then applied to them for the purchase of a lawsuit; and they executed to him a quitclaim deed. By this decision now made, that act of putting their hands and seals to, and acknowledging the instrument before a magistrate in Baltimore, works the wondrous effect of changing the rightful possession of him who was the legal owner one moment before, into a tortious act, for which this court will maintain the action of trespass and ejectment. I can not believe that such is the law. Bool v. Mix, 17 Wend. 132, 31 Am. Dec. 285, is expressly against it; and in my judgment is a decision that will bear the strictest scrutiny, and be found sustained both by principle and authority. I refer to that case as a full exposition of my views upon the point wherein I differ from the other members of the court. It seems to me that their opinion makes the minor's deed, in substance, an absolute nullity; contrary to the admitted rule which I have firstly above stated. That it is at war with the second rule which I have stated, inasmuch as it permits other persons than the minor to take advantage of his minority; and that it is against good policy, inasmuch as it must tend to encourage a species of speculation that should be invariably discouraged, and which disturbs the peace of community.

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[56] An unconditional sale of personal property by the late infant after arriving at full age is sufficient to avoid a chattel mortgage made while the mortgagor was an infant. Chapin v. Shafer, 49 N. Y. 407 (1872); State v. Plaisted, 43 N. H. 413 (1861); State v. Howard, 88 N. C. 650 (1883).

SINGER MFG. CO. v. LAMB.

(Supreme Court of Missouri, 1883. 81 Mo. 221.)

MARTIN, C. This was a suit to foreclose a mortgage conveying 640 acres of land, and was instituted against the mortgagor and all other persons interested in the land by conveyance under him. The controversy which comes before us, relates to only eighty acres of the mortgaged land, claimed by Isaac N. Lamb, who is the appellant from the decree of foreclosure as to this parcel. The pleadings were sufficient to embrace the issues contained in the evidence, and need not be recited.

On the 14th day of February, 1876, W. W. Chenault executed and delivered to the plaintiff a mortgage on the whole 640 acres. At this time he was a minor, under the age of twenty-one years. On the 26th day of July, 1876, while he was still a minor, he executed and delivered to one Leroy Moore, a warranty deed to eighty acres of the mortgaged tract for a consideration of $350. On the 17th day of November, 1876, said Moore, by warranty deed, conveyed the same parcel of eighty acres to Isaac N. Lamb, defendant, for a consideration of $400. On the 25th day of March, 1879, and after the mortgagor had attained his majority, he executed and delivered to the defendant, Lamb, a quit-claim deed for the same parcel of eighty acres. On the 2nd day of April, 1880, the mortgagor executed and delivered to plaintiff a deed affirming the mortgage deed as to all the land conveyed by it.

The deed made by the mortgagor to Leroy Moore, while he was still a minor, could not constitute a disaffirmance of the mortgage deed previously made during his minority. If his quit-claim deed to the defendant, Lamb, after he had reached his majority, was effective in disaffirming the mortgage deed, as to the land in controversy, then the subsequent deed of affirmance of the mortgage deed, as to the same land, could have no effect in giving it to the plaintiff or preserving it in its security. Thus the sole question necessary for us to consider is, whether the quit-claim deed operated as a disaffirmance of the mortgage deed as to this parcel of land. This is the only point presented by counsel on both sides.

The deed of a minor is not void, but only voidable, after he reaches his majority. Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Huth v. Carondelet, etc., Co., 56 Mo. 202. The right to disaffirm may be exercised by his heirs and representatives within the time permitted to him for doing the act. Ill., etc., Co. v. Bonner, 75 Ill. 315. It requires no affirmative act to continue its validity, but only an absence of any disaffirming acts. It remains valid in all respects, like the deed of an adult, until it has been disaffirmed by the maker, after reaching his majority. The ancient doctrine which required the disaffirming act to be of as high and solemn a character as the act disaffirmed has no place in modern law. The disaffirming act need take no particular form or expression. Allen v. Poole, 54 Miss. 323; White v. Flora, 2 Overt. (Tenn.) 426; Phillips v. Green, 5 T. B. Mon. (Ky.) 344. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument. If the minor after reaching his majority, has expressly repudiated his deed, there remains nothing for construction. But when the disaffirmance proceeds from the acts of the minor, after reaching majority, they must, in their nature, imply a repudiation of the voidable instrument. If they are consistent with the continued existence of such instrument, there is no disaffirmance, and the deed remains unaffected. Leitensdorfer v. Hempstead, 18 Mo. 269; Ill. Land Co. v. Beem, 2 Ill. App. 390; Eagle Fire Co. v. Lent, 6 Paige (N. Y.) 635; McGan v. Marshall, 7 Humph. (Tenn.) 121.

In applying this controlling principle, it has been held, that an absolute conveyance by a minor is necessarily avoided by a subsequent absolute conveyance of the same land, after majority, to a third person. Youse v. Norcoms, 12 Mo. 550, 51 Am. Dec. 175; Norcum v. Sheahan, 21 Mo. 25, 64 Am. Dec. 214; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Jackson v. Burchin, 14 Johns. (N. Y.) 124 The effect of the disaffirming act must depend greatly upon the nature and effect of the act claimed to have been disaffirmed. It has been held that a subsequent mortgage, after majority, does not necessarily avoid a prior one made during minority. McGan v. Marshall, 7 Humph. (Tenn.) 121. Two deeds to different persons, purporting to convey the absolute title to a parcel of land, cannot stand together any more than two bodies can occupy the same space. They are necessarily inconsistent. But this is not necessarily the case with two mortgages. The second one takes effect on the equity of redemption, and there may be value enough in the real estate to satisfy both. And upon the same reasoning it has been held, that a subsequent deed purporting simply to convey "all the undivided moiety of all those certain lots," would not operate as a disaffirmance of a prior mortgage on the same property made by the grantor during minority. It was held that the obvious intent of such a conveyance, in the absence of any expression to the contrary, was to vest the title in the grantor, subject to the prior mortgage. Palmer v. Miller, 25 Barb. (N. Y.) 399. It has been held, that a subsequent conveyance, with covenants of warranty, would be inconsistent with a prior mortgage, and would operate as a disaffirmance of it. Dixon v. Merritt, 21 Minn. 196. But, however the law may be in these cases, noticed by me for illustration, I am convinced that a subsequent quit-claim deed cannot, either on principle or authority, be accepted as a disaffirmance of a prior mortgage. The two instruments are consistent with each other, and can stand together. The quit-claim purports to convey only the estate remaining in the grantor at the time of its execution. In operating on this estate as it existed, it carried it to the grantee subject to the mortgage. The right to disaffirm the mortgage was a personal privilege of the grantor, and could not be considered as an inherent part of the title transferred. Hoyle v. Stowe, 19 N. C. 320. It could not be regarded as passing to an assignee, in the absence of express language to that effect, so long as the grantor remained in being to exercise it himself. Neither do I perceive how a deed which is entirely consistent with the mortgage, and does not in its nature or language purport to disaffirm it, can be construed as sufficient to carry to the grantee, the personal privilege of the grantor to disaffirm it, in the absence of apt words indicating an intention to convey or surrender the privilege. The fact that the grantee in the quit-claim had actual, as well as constructive knowledge of the existence of the mortgage, and paid no valuable consideration for the quit-claim, could add nothing to the strength of his position; and for that reason need not be considered.

Our opinion is that the decree was without error and should be affirmed. It is so ordered. All concur, except NORTON, and SHERWOOD, JJ., absent.[57]

BAGLEY v. FLETCHER.

(Supreme Court of Arkansas, 1884. 44 Ark. 153.)

SMITH, J.[58] Bagley filed this bill to quiet his title to a quarter section of land which he had acquired by purchase from Mrs. Rowland and her husband. The deed to Bagley is in the form of a bargain and sale, containing no covenants, however, except that the grantor was the owner of the land by virtue of a donation deed to her, as a married woman, by the State, and that she had never alienated or incumbered it. The bill stated that about eighteen months after the plaintiff had procured his title, the Rowlands, husband and wife, had conveyed the land by quit-claim to the defendant. And this was the cloud that was sought to be removed.

The answer set up that Mrs. Rowland was, at the date of the execution of her first deed, an infant. And the proofs showing that she was at that time only about seventeen years old, and that in six or seven months after attaining her majority she sold and conveyed the land to Fletcher, the Circuit Court dismissed the bill.

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[57] Accord: Shreeves v. Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396 (1904). Contra: Hetterick v. Porter, 20 Ohio Cir. Ct. R. 110 (1900). See, also, Bozeman v. Browning, 31 Ark. 364 (1876), post, p. 258, and Mansfield v. Gordon, 144 Mass. 168, 10 N. E. 773 (1887), post, p. 261.

[58] Part of the opinion of Smith, J., is omitted.

At the date of both conveyances the land was wild and unoccupied, and, as we may infer, of but little value. The consideration expressed in Bagley's deed is $50. And this sum was made up of $3 in cash, $3.70 in taxes refunded to Mrs. Rowland and the remainder was the estimated value of Bagley's services in looking up the title to the land and procuring the donation to Mrs. Rowland. Fletcher paid $25 for his quit-claim, and he was advised that Mrs. Rowland had previously conveyed the land to Bagley. But he expressed his willingness to take his chances for getting the land and to protect Mrs. Rowland against all risks she might run by a second conveyance.

[The court then held that Mrs. Rowland's deed to Bagley was voidable at her election, and that a second conveyance by one after coming of age of land previously conveyed while an infant, operated as a disaffirmance of the first conveyance. The opinion then proceeds:]

Nor can any solid distinction, grounded on the form of Mrs. Rowland's deed to Fletcher, be taken as to the efficacy of that deed, considered as an act of disaffirmance. In England we understand the law to be that a deed of release can never operate technically as a conveyance per se, but only by way of enlargement of a previous estate. Consequently if the releasee was not in possession and had not some other interest in the land, he had no estate to be enlarged. But in this country a quit-claim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor, as a deed with full covenants, although the grantee has no possession of or prior interest in the land. It is almost the only mode in practice where the vendor does not wish to warrant the title. See article on the nature and effect of a quit-claim deed, in 12 Cent. Law Jour., 127, and cases cited; among others, Brown v. Jackson, 3 Wheat. 449, 4 L. Ed. 432; Kyle v. Kavanaugh, 103 Mass. 359, 4 Am. Rep. 560; Pray v. Pierce, 7 Mass. 381, 5 Am. Dec. 59; Jackson v. Fish, 10 Johns. (N. Y.) 456; Hall v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424.

In fact, the covenants in a deed constitute no part of the conveyance, but are separate contracts. The title passes independently of them.

To say, then, that an infant can not disaffirm a previous contract of sale by executing a quit-claim deed after he comes of age, is equivalent to saying that he cannot disaffirm except on condition of warranting the title of the second grantee. None of the text-books or cases that we have consulted mention any such exception to the general rule, and we are unwilling to take so novel a position.

Bearing in mind that Mrs. Rowland was, at the date of the execution of the first deed, an infant and a married woman, and that she was not bound by the covenants contained in her deed (1 Bishop on

Married Women, § 603; Benton County v. Rutherford, 33 Ark. 640), the two deeds were not essentially dissimilar. By the first the estate simply flowed from her, provided she did no act to defeat it after full age. But her covenants of seizin and against incumbrances were void. * * *

Decree affirmed.

Mr. Chief Justice COCKRILL concurred.

EAKIN, J., dissenting. [After stating "that the conveyance after majority will not be a disaffirmance if it is compatible with any reasonable supposition that the grantor did not intend to recall the former right," he proceeds:]

I think, therefore, the question now in judgment can not be decided by the application of any cast-iron rule to the two simple facts, that Mrs. Rowland, as an infant, sold to Bagley, and then, as an adult, conveyed the same lands by quit claim to Fletcher. We must look deeper, and consider the circumstances of Fletcher's purchase and the nature of his conveyance, and find its solution in determining whether or not the quit claim to Fletcher is so wholly incompatible with the former sale to Bagley as to clearly manifest an intention on Mrs. Rowland's part to disaffirm Bagley's title.

It was effective to pass only the title Mrs. Rowland then had. Witter v. Biscoe et al., 13 Ark. 426. It charged Fletcher with full notice of all imperfections of the vendor's title and all equities against it, inasmuch as he did not pay full price for the land as the evidence plainly shows. Miller v. Fraley et al., 23 Ark. 735. It did not serve the ordinary purpose of a good and sufficient conveyance. Watkins v. Rogers, 21 Ark. 298.

It is not necessary that such deeds should have anything to operate on in order to make them sufficiently desirable to be worth getting at some trouble and expense. They do not imply, necessarily, that the grantor has any title. Operating innocently as to all other claimants, they only estop him. They quiet apprehensions and fortify against defects and irregularities, or lost instruments or lack of registration. They are frequently given and taken for peace. They can not be incompatible with any former alienations. It is common in some of the States to announce the general rule to be that a deed with covenants of warranty will be a disaffirmance of a conveyance made in infancy. That idea enters into the leading case on the general rule. Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345. Mr. Justice Story, speaking of the deed made after full age, says: "The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him, and a covenant that he had a good right and title to convey the same, and therefore is a positive disaffirmance of the former deed."

After a rather industrious search and inquiry, I have been unable to find a single case in which it has been held that a quit-claim deed, by its own force, will avoid a conveyance made in infancy. The opinion of the court seems to make it conclusively a disaffirmance. I think it should depend on intention, to be ascertained from the circumstances and nature of the second deed. It is enough for the protection of infants that they are allowed after age to disaffirm their conveyances. They are not bound to do so, and I fear it will work injustice to make their acts have that effect, when they may not have intended it. In this case, I do not clearly see that Mrs. Rowland did so intend.

DRAKE'S LESSEE v. RAMSAY.

(Supreme Court of Ohio, 1831. 5 Ohio, 251, 253.)

Ejectment. Mrs. Drake had executed a deed while an infant. In considering what is necessary to avoid an infant's deed, LANE, J., said: "Some of the books apparently suppose that the act of avoidance must be equal solemnity with the act of grant. Rogers v. Hurd, 4 Day (Conn.) 57; Jackson ex dem. Brayton v. Burchin, 14 Johns. (N. Y.) 124. But I can not find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary; we believe that an entry, suit, or action, a subsequent conveyance, an effort to restore parties to their original condition, or any act unequivocally manifesting the intention,[59] would render the avoidance effectual, and that the institution of, this suit is an act fully possessing this character."[60]

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[59] In McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 South. 417, 12 L. R. A. 136 (1890), the declaration by the infant on coming of age, made to the seller by letter, that he the infant repudiated the sale to him on the ground of his infancy, was sufficient to a complete disaffirmance.

[60] Accord: Doe v. Woodruffe, 7 U. C. Q. B. 332 (1850); Hughes v. Watson, 10 Ohio, 127, 134 (1840); Hoyle v. Stowe, 19 N. C. 320, 324 (1837); Chadbourne v. Rackliff, 30 Me. 354, 361 (1849); Webb v. Hall, 35 Me. 336 (1853); Cole v. Pennoyer, 14 Ill. 162 (1852); Birch v. Linton, 78 Va. 584, 590, 49 Am. Rep. 381 (1884); Clark v. Tate, 7 Mont. 171, 14 Pac. 761 (1887); Slater v. Rudderforth, 25 App. D. C. 497 (1905).

In Hoyle v. Stowe, supra, the court, by Ruffin, C. J., said: "It is not perceived, either, why the infant may not at once bring ejectment for the land, without a previous disaffirmance in pais; for the thing to be avoided is not an estate, but simply the deed. If an infant be sued on his bond, he disaffirms it by plea simply. If he sells personal chattels, he disaffirms the whole contract, whether by delivery or by deed, by suing for the chattels, which is the constant course. It is otherwise in the case of land, when the conveyance operates by way of transmutation of the possession. But a deed of bargain and sale is out of the reason of that."

III. ESTOPPEL

CARPENTER v. CARPENTER.

(Supreme Court of Judicature of Indiana, 1873. 45 Ind. 142.)

See post, p. 246, where this case is given in full.[61]

SCHMITHEIMER et ux. v. EISEMAN.

(Court of Appeals of Kentucky, 1870. 7 Bush, 298.)

Judge LINDSAY delivered the opinion of the court.

Appellant, Louisa Schmitheimer, was formerly the wife of Jacob Schnell, now deceased. During the life of her said first husband she joined with him in conveying to appellee, Eiseman, a certain parcel of land in the city of Louisville, inherited by her from her father.

In conjunction with her present husband she prosecutes this suit to have said conveyance set aside, and to compel appellee to restore to her the possession of the land. She claims that at the time of the execution of the conveyance she was an infant under the age of twenty-one years, and that she was induced to join in its execution by reason of the "threats, persuasion, and influence" of her first husband.

The allegation of infancy seems to be sustained by a preponderance of testimony; but it appears that before Eiseman could be induced to part with his money, or to accept the deed now sought to be vacated, Louisa and her then husband, for the purpose of satisfying him that she had attained her majority, made oath before a notary public that to the best of their knowledge and information she was then more than twenty-one years of age. Appellee, relying upon the truth of the statement thus solemnly made, concluded the trade theretofore negotiated by making the agreed payments and accepting the title. [A portion of the opinion omitted.] There is nothing in the record which indicates that she acted either under the coercion or persuasion of her husband; but when her subsequent conduct is considered, we can not escape the conclusion that she was a willing participant in all that he did.

Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor femes covert are privileged to practice frauds upon innocent persons. 1 Story's Equity, p. 385; Davis v. Tingle, 8 B. Mon. 543; Simrall's Heirs v. Jacob's Ex'rs, 14 B. Mon. 513.

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[61] Accord, on the point of estoppel: Norris v. Vance, 3 Rich. Law (S. C.) 164 (1846); Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676 (1884). Contra: Barham v. Turbeville, 1 Swan (Tenn.), 437, 57 Am. Dec. 782 (1852).

In this case the conveyance of appellant is only voidable. The contract of sale is fully executed. Appellee asks only to be left in the undisturbed possession of property for which in good faith he paid a fair and full consideration. The chancellor could give no relief to appellant without making himself a party to her iniquitous and fraudulent conduct, and we think he properly dismissed her petition.

Wherefore we affirm his judgment.[62]

FERGUSON v. BOBO.

(Supreme Court of Mississippi, 1876. 54 Miss. 121.)

Bill to enjoin action of ejectment and to prohibit the issuance of a writ of habere facias upon judgment in ejectment and to compel the plaintiff in said judgment to cesset processus. The judgment in ejectment had been obtained by Sally Bobo upon the disaffirmance after she came of age of a deed executed by her while an infant. Further facts set up in the bill and proved appear in the opinion of the court. The bill was dismissed upon the ground that nothing had been charged or proved which could justify the interference of a court of equity.[63]

CHALMERS, J. [after stating the case and dealing with an infant's liability for his fraud in actions of tort or by way of estoppel in courts of law and equity, continued as follows:]

It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion by direct participation, or by silence, when he was called upon to speak, has entrapped a party ignorant of his title or of his minority, into purchasing his property from another, he will be estopped in a court of chancery from setting up such title: Sugden on Vendors, 507, 508; Watts v. Creswell, 9 Vin. Abr. 415; Cory v. Gertcken, 2 Madd. 40, 46; 1 Story, Eq. Jur. § 385; Hall v. Timmons, 2 Rich. Eq. (S. C.) 120; Whittington v. Wright, 9 Ga. 23; Herman on Estoppel, 416, and authorities there cited. How long before this doctrine will be fully adopted by courts of law, as so many equitable principles have been, the future history of our jurisprudence must determine.

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[62] Accord: Overton v. Banister, 3 Hare, 503 (1844), bill to require trustees to pay again after the plaintiff had induced payment by representing himself of age; Corey v. Gertcken, 2 Madd. 40 (1816); Hayes v. Parker, 41 N. J. Eq. 630, 7 Atl. 511 (1886); Hall v. Timmons, 2 Rich. Eq. (S. C.) 120 (1845), bill to compel specific delivery of a slave; Ostrander v. Quin, 84 Miss. 230, 36 South. 257, 105 Am. St. Rep. 426 (1904); Ingram v. Ison, 80 S. W. 787, 26 Ky. Law Rep. 48 (1904); Ison v. Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. Law Rep. 366 (1903), bill to set aside deed, post, p. 212; Ryan v. Growney, 125 Mo. 474, 28 S. W. 189, 755 (1894).

Although the infant has been guilty of fraud, yet if the adult has been guilty of unconscionable conduct, for instance, overreaching the infant, the defense of infancy will be valid. Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464 (1899); Alt v. Graff, 65 Minn. 191, 68 N. W. 9 (1896).

[63] Statement abridged from opinion.

The doctrine is decisive of the case at bar. Sally Robbins, now Mrs. Bobo, knew her rights, such as they were, when, at the age of nineteen, she conveyed the property to her father to enable him to borrow money on a mortgage thereof to Mrs. Ferguson, as she was fully informed he intended to do. The latter was ignorant of the minority of the former, and consequently ignorant of her title, when, some days thereafter, she loaned her money and accepted the mortgage, and equally ignorant when she received the fee-simple conveyance, for which, as the record discloses, she reluctantly gave a credit on the note in excess of the value of the property.

Under such circumstances, a court of equity will restrain Mrs. Bobo from the assertion of her legal title. This proceeds not so much from the deed executed to her father, which ordinarily would be voidable, but from the knowledge which she had that it was to be used to procure money from the complainant. She is estopped from the perpetration of a fraud.

The decree of the court below dismissing the bill will be reversed, and cause remanded.

SIMS v. EVERHARDT.

(Supreme Court of the United States, 1880. 102 U. S. 300, 26 L. Ed. 87.)

Bill to set aside a deed made by the complainant while an infant and a married woman. The bill was dismissed.

Mr. Justice STRONG [64] [after delivering the opinion of the court as hereinafter printed (post, p. 209), continued:]

The remaining question is whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted that she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. Brown v. McCune, 5 Sandf. (N. Y.) 224; Keen v. Coleman, 39 Pa. 299, 80 Am.

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[64] Statement abridged, and part of opinion omitted.

Dec. 524. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed. * * *

The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion; and it is so ordered.

BENNETTO v. HOLDEN.

(Court of Chancery of Ontario, 1874. 21 Grant, Ch. 222.)

Bill by those claiming under John Bennetto, who received a conveyance from Mary Holden while she was a minor, against Mary Holden and others, to whom she conveyed after she reached her majority, to set aside the latter conveyance and to establish the former. The facts are fully stated in the opinion.

Blake, V. C.[65] The facts of this case seem to be as follows: Mary Holden, in May, 1872, when an infant and married woman, executed an instrument purporting to convey the premises to one John Bennetto, since dead, and who is represented by the plaintiffs. This instrument was duly registered. Thereafter by two instruments, apparently for value and duly registered, Mary Holden conveyed the same and other premises to the defendant O'Reilly. This latter gentleman, apparently for value, conveyed to his partner and co-defendant the premises in question, and this grantee mortgaged them to the defendant Mitchell for $400, which was then advanced by her. The instruments to O'Reilly were executed and registered after Mary Holden became of age. Subsequently to the execution of these instruments, and in October 1873, Mary Holden duly conveyed the same premises to the defendant Mary Bennetto in trust for the representatives of John Bennetto, then deceased. There is no doubt that when Mary Holden executed the instrument to John Bennetto she was not 21 years old, and it is equally clear that at the time of her signing this deed she represented herself to be of age, and that upon the strength of such statement then made the bargain was completed, and the purchase money paid. The learned counsel for the defendants admitted that these representations bound Mary Holden so that in a proceeding between her and John Bennetto no advantage could be taken of the non-age of Mary Holden. Under these circumstances, it was argued for the plaintiffs, that as the conveyance to John Bennetto was registered when the conveyance to O'Reilly was given, the latter took with notice of this instrument, accepted with such representations as to bind the grantor, and therefore that the subsequent grantee must be taken to have had notice of an instrument effectual to pass the premises; and so the conveyance to O'Reilly was ineffectual to convey him any beneficial interest in the premises. I have had much difficulty in arriving at a conclusion in the case satisfactory to my mind. When the plaintiffs produce the deed of May, 1872, the answer of the defendants thereto is that as it was executed while Mary Holden was under age, nothing passed by it. To this the plaintiffs reply, although that be so, yet owing to the representations made at the time of the execution of the instruments an equity has arisen in their favor which prevents Mary Holden from raising the question of infancy. But it is alleged, at this stage, that the Registry Laws come to the assistance of the defendants; that by these enactments the defendants have notice of a deed which, on inquiry, they find could pass nothing, owing to the disability under which the grantor was at the time of its execution; that they had no notice of the representations made at the time of its execution, which obviate this result; that as the defendants can rely on the infancy, and the plaintiffs cannot, under the Registry Laws, set up these representations, the case of the plaintiffs fails. For some time I remained of opinion, as I was at the hearing of the cause, that this was the correct view to take. Further consideration has led me to think otherwise. The plaintiffs do not here seek to prove any fact inconsistent with the apparent effect of the deed on which they rely. They do not ask to enlarge or alter its apparent effect, to add a single iota to it, or to enforce any equitable lien, charge or interest as affecting the land, and not covered in terms by the instrument. The Registry Laws were intended to protect the title of a bona fide purchaser with a registered conveyance against claims outside the registry office—claims not to be found on the records which are made the test, and which would otherwise impair a title which may have been accepted in good faith, after search made in the place where all information touching the right to the premises should be found. Here, in the proper office, is produced an instrument executed by the apparent owner of this property, and apparently conveying away an estate in fee simple therein. If persons deal with land thus circumstanced and find the instrument, in effect, conveys that which it purports to do, they can scarcely complain of being misled in the matter. The registry office gives them complete notice, and if with that they deal with the premises thus situated they must, I conceive, be held bound so long as the actual effect of the instrument is not attempted to be proved as more extensive than, or different from its apparent effect. There is a vast difference between the case of a party dealing with property without notice of a claim until it is sprung upon him subsequent to his purchase, and that of a man who has had placed under his notice a conveyance in fee of the premises which shews that primâ facie his grantor has no interest to convey to him, and who, with this clear information before him, completes his purchase, and then seeks, not to defend his position against a flaw unknown at the date of his bargain, but one, in spite of which, and running the risk of that which may flow from it, he concludes his agreement. I am of opinion that here the defendant has taken subject to an instrument which bound the grantor, Mary Holden, and her subsequent grantees. * * * [66]

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[65] Statement abridged and part of opinion omitted.

IV. ACTS ON THE PART OF THE INFANT AFTER REACHING MAJORITY WHICH PRECLUDE HIM FROM RECOVERING THE CONSIDERATION

PROUT v. WILEY.

(Supreme Court of Michigan, 1873. 28 Mich. 164.)

CHRISTIANCY, C. J.[67] This was a bill to remove a cloud from the complainant's title to one hundred and sixty acres of land in Ingham county. The title, and the facts affecting it, as shown by the evidence, were as follows: Cornelius Cadwell, being then a minor, purchased the land at the United States Land Office, December 23, 1848, and on the 5th day of October, 1850, while still a minor (and only twenty years old in July of that year), sold and conveyed the land to George A. Wallace, for the consideration of one hundred and twenty-five dollars. * * * Shortly after the execution of the deed, in the spring of 1851, and while yet a minor, Cadwell left the state and went to California, and thence to Central America, and did not return to this state until the latter part of August, 1857. In the mean time, Wallace, on the 28th day of October, 1850, conveyed the land to one Phoebe Ann Skidmore, who, on the 14th of September, 1853, conveyed the same to one Charles Koegel, who was in possession of the land when Cadwell returned from Central America in 1857. In November, 1857, Cadwell, then living in Washtenaw county, some eighteen or twenty miles from the land, went and saw Koegel, informed him that at the time he made the deed to Wallace he was a minor, and that the deed was not good; but offered to give him a deed for seventy-five dollars in money. Koegel offered to pay him that amount in stock, which Cadwell refused, and Koegel said he would have the money the next May. Cadwell again called upon Koegel the next May for the money; but Koegel then refused to do anything about it, claiming that his title was good, whereupon Cadwell, as he testifies, caused a notice of ejectment to be served upon Koegel. Nothing further, however, appears then to have been done. In the winter of 1859 or 1860 Cadwell went and resided at Leroy in Ingham county, within two miles of the land, where he seems to have resided till the latter part of 1864 or the spring of 1865, when he removed to Williamston, in Ingham county, whence, in the spring of 1865, he was drafted into the army, and returned in September, 1865.

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[66] Accord: Damron v. Commonwealth, 110 Ky. 268, 61 S. W. 459, 96 Am. St. Rep. 453 (1901). See, also, Kilgore v. Jordan, 17 Tex. 342 (1856). Contra (where the case was not affected by any recording acts): Inman v. Inman, L. R. 15 Eq. 260 (1873).

In Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224 (1865), it was held that where the infant conveyed to A., who recorded, and after attaining majority disaffirmed this conveyance and then conveyed to B., who recorded, B. prevailed over A.

[67] Part of the opinion is omitted.

Some time between 1857 and 1865 (the exact date does not appear), Koegel died, leaving, as we infer from the evidence, a tenant in possession, who had gone in previous to his death. While Cadwell was in the army he was informed that this tenant had left the land and the premises were vacant, and he thereupon authorized one Lewis Haviland, the son of Lewis J. Haviland, next mentioned, to take possession of the land for him; which he did, and continued in possession until June 1st, 1865, when Cadwell sold and conveyed the premises by warranty deed to Lewis J. Haviland, who took possession under his deed and remained in possession until December 17th, 1867, when he sold and conveyed the premises to complainant, who took and holds possession under his deed.

On the third day of November, 1865, some five months after Cadwell had conveyed to Haviland, and while the latter was in possession, the administrator on the estate of Koegel, in pursuance of a license from the probate court, sold the land, or the interest of the deceased therein, to the defendant Wiley, and the report of the sale by the administrator to the probate court (which was confirmed), states, among other things, that there was an adverse claim to the premises sold to said Wiley, and that another party claims to hold the same.

The amount of the improvement upon the land was small, being only about or a trifle over twenty acres, some of which was imperfectly cleared, and the buildings poor and of little value. Whatever of improvement there was upon the land seems to have been mostly made by Koegel, while Cadwell was absent in California and Central America, and if any were made after his return, they were made, so far as the case shows, after Koegel had received notice from Cadwell that he repudiated the deed, or did not intend to be bound by it. And there is no evidence in the case tending to show that Cadwell stood by, after his majority, when improvements were being made upon the land, without objections or notice, or that he was ever aware of any improvements going on upon the land. In our view, therefore, the case is disembarrassed of any question of estoppel upon this ground; and the only question in reference to the validity or effect of the minor's deed, is whether his neglect to make an actual disaffirmance of the deed, by entry or conveyance, until the time he undertook thus to disaffirm it, did, under the circumstances of this case, operate as an affirmance or confirmation of the deed executed during his minority; for, though the question has sometimes been raised whether the conveyance to another person after becoming of age, would, without entry, operate as a disaffirmance, there was here both an actual entry and a conveyance, which clearly operated as a disaffirmance, unless the delay which had previously occurred amounted to an affirmance, and cut off the right to disaffirm.

Upon this question of the affirmance of a deed executed during minority, by mere lapse of time, or in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose, it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time, might depend much upon the special circumstances of the particular case.

This distinction reconciles nearly, though not quite all of the decisions upon this subject.

In the present case, we can discover no grounds of equitable estoppel and no such special circumstances as can properly be held to change the question from that of simple delay or lapse of time in disaffirming the deed; and we must therefore hold that Cadwell had the right to disaffirm, to re-enter upon the land and to convey to Haviland; and that the complainant therefore obtained and holds the title, and is entitled to the relief he asks to remove the cloud created by the administrator's deed to the defendant.

But the complainant stands only in the place and succeeds only to the rights of Cadwell, who, while a minor, had conveyed to Wallace; and the defendant occupies the place and is entitled to the equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities than would have existed between Cadwell and Wallace.

And as the privilege of infancy is a shield for the protection of the infant, and not a weapon of attack, nor to be used as an engine for defrauding others, and he cannot, therefore, especially in a court of equity, be allowed to disaffirm and repudiate his deed and regain the property, without restoring the consideration he had received for it (there being no evidence of bad faith in Wallace in making the purchase). And as the complainant, standing in his place and clothed only with his rights, is compelled to ask the aid of the court of equity to remove the cloud upon his title, he should, I think, as a condition of that relief, consent to do equity to the other party. Hillyer v. Bennett, 3 Edw. Ch. 222; Locke v. Smith, 41 N. H. 346; Strain v. Wright, 7 Geo. 568; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Weed v. Beebe, 21 Vt. 495; 2 Kent's Com. 240.

But upon this point my Brethern do not concur in laying down the principle thus broadly, though my Brothers Cooley and Graves concur in the result upon this point in the present case, on the ground that complainant makes no objection to the allowance to defendant of the amount of the consideration, and by implication admits its justice in the present case while my Brother Campbell thinks the principle inapplicable, even upon this ground, without the clear and express assent of complainant, in a bill like this, to quiet title. * * *

A decree of this court should therefore be entered affirming the decree of the court below in favor of the complainant, on condition that complainant, within sixty days from this date, pay to the defendant the said sum of one hundred and twenty-five dollars, and with interest to the day of such payment; otherwise that complainant's bill be dismissed, with costs to defendant.

The other Justices concurred.[68]

GOODNOW v. EMPIRE LUMBER CO.

(Supreme Court of Minnesota, 1884. 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.)

Appeal by defendants from an order of the district court for Winona county, Start, J., presiding, overruling a demurrer to the complaint, the substance of which is stated in the opinion.

Gilfillan, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of

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[68] Accord: Shipp v. McKee, 80 Miss. 741, 31 South. 197, 32 South. 281, 92 Am. St. Rep. 616 (1902); Eagan v. Scully, 29 App. Div. 617, 51 N. Y. Supp. 680 (1898), affirmed 173 N. Y. 581, 65 N. E. 1116 (1902). See full collection of authorities 18 Am. St. Rep. 677.

The same rule has been applied to a claim for damages due to the releasee's negligence. Chicago Telephone Co. v. Schulz, 121 Ill. App. 573 (1905).

Observe that when the disaffirmance is complete the question of the infant's right to recover without returning the purchase price arises. For treatment of this subject see post, p. 216 et seq.

Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act to disaffirmance in case they then had the right to disaffirm,—and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed,—there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and, as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so; and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that, even if the period of minority of plaintiffs were to be excluded, (and we doubt if it should be,) there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not, (where there are no circumstances other than lapse of time and silence,) and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: Vaughan v. Parr, 20 Ark. 600; Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Prout v. Wiley, 28 Mich. 164; Youse v. Norcum, 12 Mo. 549, 51 Am. Dec. 175; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Baker v. Kennett, 54 Mo. 82; Huth v. Car. Mar. Ry. & Dock Co., 56 Mo. 202; Hale v. Gerrish, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsay, 5 Ohio, 252; Cresinger v. Lessee of Welsh, 15 Ohio, 156, 45 Am. Dec. 565; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Ordinary v. Wherry, 1 Bailey (S. C.) 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt. 35; Dublin & W. Ry. Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Bostwick v. Atkins, 3 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. (N. Y.) 641; Kline v. Beebe, 6 Conn. 494; Wallace v. Lewis, 4 Har. (Del.) 80; Hastings v. Dollarhide, 24 Cal. 195; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Richardson v. Boright, 9 Vt. 368; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. Law (S. C.) 55, 64 Am. Dec. 760.

The rule holding certain contracts of an infant voidable, (among them his conveyances of real estate,) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace v. Lewis, "a dangerous weapon of offense, instead of a defense." For we cannot assent to the reason given in Boody v. McKenney, (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification,) "that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without unnecessary delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles,) and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. Cochran v. Toher, 14 Minn. 385, (Gil. 293;) Derosia v. W. & St. P. R. Co., 18 Minn. 133, (Gil. 119.) Three years and a half, the delay in this case, (excluding the period of plaintiff's minority, after the time within which to act had commenced to run,) was prima facie more than a reasonable time, and prima facie the conveyance was ratified.

Order reversed.[69]

WEEKS v. WILKINS.

(Supreme Court of North Carolina, 1904. 134 N. C. 516, 47 S. E. 24.)

Action for recovery of land. The land in controversy belonged to Hester Weeks for life with remainder to her eight children. In this state of the title and on June 1st, 1863, Hester and seven of her children, among whom was the plaintiff Sampson Weeks, then a minor, made a conveyance of the land in question. The defendant claimed the interest of the minor Sampson Weeks under this deed. Hester Weeks died July 10th, 1896, and this action was brought within three years thereafter. Further facts are stated in the opinion of the court. Judgment for the plaintiff. The defendant appeals.

CONNOR, J.[70] [after stating the facts]. We take it to be well settled in this State that the deed of an infant, operating as it does under our registration laws by transmutation of possession, is voidable and not void. Hogan v. Strayhorn, 65 N. C. 279; McCormic v. Leggett, 53 N. C. 425; Ward v. Anderson, 111 N. C. 115, 15 S. E. 933; Cox v. McGowan, 116 N. C. 131, 21 S. E. 108; Kent, Com. 236; 1 Devlin on Deeds, 86. We do not find in the record any evidence of acts on the part of Sampson Weeks amounting to an affirmance, and his Honor would have been justified in so saying to the jury. The institution of this action is a clear disaffirmance, as his Honor told the jury. The defendants, however, asked the Court to instruct the jury that such disaffirmance must be within a reasonable time after the plaintiff reached his majority. He was of the opinion, and so instructed the jury, that in view of the existence of the outstanding life-estate of Hester Weeks, the action brought within three years after her death was within the time prescribed by law. The defendants excepted, and this exception presents the question which must be decided by us.

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[69] Accord: For full collection of authorities see 18 Am. St. Rep. 675 (1890). The legislative tendency seems to be toward the rule of this case. Stimson, Am. St. § 6602. See, also, McCullough v. Finley, 69 Kan. 705, 77 Pac. 696 (1904); Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503 (1904); Bentley v. Greer, 100 Ga. 35, 27 S. E. 974 (1896); Combs v. Noble, 58 S. W. 707, 22 Ky. Law Rep. 736 (1900). As to what is a reasonable time within which to disaffirm, see Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475 (1903); Walker v. Pope, 101 Ga. 665, 29 S. E. 8 (1897).

[70] Statement abridged and part of opinion omitted.

This court has not, so far as the brief and argument of counsel and our own investigation show, decided the question as to when an infant, after arriving at his majority must disaffirm his deed. The only case approaching it is Dewey v. Burbank, 77 N. C. 260, in which it is said that after his reaching his majority he may avoid or confirm it, and that continuing to reside on the land and paying a part of the purchase-money (he being in that case the purchaser) amounts to an election to ratify. The author of Devlin on Deeds, vol. 1, § 91, after discussing the authorities says: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it." We think this is a just and reasonable rule. It is sustained by a large number of well-considered cases. Kline v. Beebe, 6 Conn. 494, in which Hosmer, C. J., says: "A ratification of the contract has often been inferred from the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration or availing himself in any manner of his conveyance. * * * The omission to disaffirm a contract within a reasonable time has been held sufficient evidence of a ratification." Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. Rep. 837. In Blankenship v. Stout, 25 Ill. 132, it is held that a conveyance of real estate by an infant must be disaffirmed within three years after his arrival of full age; Caton, C. J., saying: "It is of the greatest importance that the common assurances of the country be rendered as certain as possible. Purchasers should be able to know, after ascertaining the facts whether they can purchase a good title or not. * * * This end is essentially promoted by fixing a definite limit within which a conveyance made by an infant shall be repudiated after he attains his majority. Although the tenth section of the statute * * * does not in terms apply to such cases, yet we are disposed to adopt the limitation there prescribed for the bringing of an action by an infant after he attains his majority, as a reasonable time within which he should repudiate a conveyance of real estate executed by him while an infant."[71] Tyler on Infancy, 70. In Bigelow v. Kinney, supra, it was held that disaffirmance 11 years after majority was not within a reasonable time. Drake's Lessee v. Ramsay, 5 Ohio, 252.

While we have no statute fixing the time within which an infant is required to disaffirm his conveyance, we think that, upon the reason of the thing and in consonance with the policy of the law which seeks to quiet titles, and encourage improvement of real estate, the infant should exercise his election within a reasonable time. The statute gives him three years after arrival at majority within which to bring his action against a disseisor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed.

But it is said that Mrs. Hester Weeks owned the life-estate, and that pending such estate he had no right of action to sue for the possession of the land. We do not think this material. His right to disaffirm his deed was entirely independent of his right to the possession of the land. He could easily have disaffirmed by returning the purchase-money or by some other unequivocal act which would have put innocent purchasers on notice. He could have brought his action to remove a cloud from his title under Acts 1893, c. 6. He was, according to his testimony, thirty-four years of age in 1894, and therefore reached his majority in 1881. At the time of the institution of this action he was thirty-nine years of age. He should, we think, have disaffirmed his deed within three years after he arrived at his majority.

The record before us illustrates the injustice which may be done by permitting an infant to remain quiescent for an unlimited time before doing some act which puts innocent purchasers on notice of a defect in their title. This land has been divided into five parcels and as many persons have purchased, paid for, and it seems some of them, with the knowledge of the plaintiff, have cleared and improved it. Eighteen years after his majority the plaintiff for a nominal consideration buys the interests of his brothers and sisters and brings this action—thus disturbing the rights of innocent purchasers and recovering not only the land but the rents and profits in excess of the amount paid by him for it. A stronger illustration of the wisdom of the law which seeks to quiet titles can hardly be found. His Honor should have charged the jury that the plaintiff Sampson Weeks could not recover in respect to his one-eighth undivided interest.

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[71] Accord: Cole v. Pennoyer, 14 Ill. 158 (1852); Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 (1874); Keil v. Healey, 84 Ill. 104, 25 Am. Rep. 434 (1876).

It has been held that, where the infant's deed was made in England and the infant acquired a domicile in Austria, the effect of her failing to disaffirm within a reasonable time after reaching majority was to be determined by the effect of such failure under the Austrian law, and not under the law of England, and that in consequence she was not precluded from disaffirming. Viditz v. O'Hagan, [1900] 2 Ch. 87.

[Balance of opinion omitted.]

Error.

SIMS v. EVERHARDT.

(Supreme Court of the United States, 1880. 102 U. S. 300, 26 L. Ed. 87.)

Mrs. Sims made the deed in question while covert and an infant in 1847. She disaffirmed the same about a month after she was divorced in 1870, and thereupon filed a bill to set aside the deed of 1847. The grantee was in possession, paying taxes and making improvements, and had been since the conveyance of 1847. The bill was dismissed.

Mr. Justice STRONG.[72] * * * We are not, however, called upon by the exigencies of this case to decide that a wife cannot, during her coverture, disaffirm a deed which she made during her infancy. The question now is, whether Mrs. Sims did disaffirm her deed within a reasonable time after she attained her majority. What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. State v. Plaisted, 43 N. H. 413; Jenkins v. Jenkins, 12 Iowa, 195, and numerous other cases. It must be admitted that generally the disaffirmance must be within the period limited by the Statute of Limitations for bringing an action of ejectment. A much less time has in some cases been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable.

Now, in this case, though there was no disaffirmance for nearly twenty-one years after Mrs. Sims attained her majority, there were very remarkable reasons for the delay, sufficient, in our opinion, to excuse it. When the deed was made she was laboring under a double disability—infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the Statute of Limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that when there are two or more coexisting disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden, Vendors, 103, 482; Mercer's Lessee v. Selden, 1 How. 37, 11 L. Ed. 38. This is the rule under the Statute of Limitations. But Mrs. Sims could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bishop, Married Women, § 392. Giving notice, therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Mr. Bishop, in his work to which we have referred, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. Section 516. In support of this he refers to Dodd v. Benthal, 4 Heisk. (Tenn.) 601, and Matherson v. Davis, 2 Cold. (Tenn.) 443. These cases certainly sustain the rule stated in the text. In the former it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discoverture, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. We have found no decision that is in conflict with this doctrine, and no dicta even, except those in Scranton v. Stewart. And why should the rule not be thus? The person who takes a deed from an infant feme covert knows that she is not sui juris, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk attending both those disabilities.

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[72] Statement abridged and part of opinion omitted.

But the continued coverture of Mrs. Sims, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There is evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent, and threatening, in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost anything, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make.

Add to this, that she had very little opportunity to disaffirm until after her divorce. Before she had reached her majority she removed to another State, and never returned to the neighborhood of the property to reside. Between 1848 or 1849 and 1870 she made but two visits to Laporte, both on account of sickness or the death of a relative, and neither visit was prolonged beyond three days. It is not a case, therefore, of standing by after she came of age and seeing her property in the enjoyment of another.

And again, she never did any act after her deed was made and after she came of age expressive of her consent to it or implying an affirmance of the contract. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the Statute of Limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was in effect the ruling in Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800. See also Prout v. Wiley, 28 Mich. 164, a well-considered case, and Lessee of Drake v. Ramsay, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But they either rely upon Holmes v. Blogg, 8 Taunt. 35, which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability.

In view of these considerations, our conclusion is that Mrs. Sims, the complainant, having been a feme covert until 1870, and never having done, during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and that her notice of disaffirmance and her suit avoided her deed made in 1847.

Decree reversed and record remitted with instructions to enter a decree in accordance with this opinion.[73]

ISON v. CORNETT.

(Court of Appeals of Kentucky, 1903. 116 Ky. 92, 75 S. W. 204, 25 Ky. Law Rep. 366.)

HOBSON, J. John M. Creech died about 20 years ago, leaving a widow and two children, who were both then infants. He owned four tracts of land. Some time after his death the widow intermarried with William Ison, and after this the daughter Pasha married George Ison. In the year 1886, when she was 17 years of age, she and her husband swapped her interest in the four tracts of land owned by her father to her stepfather, William Ison, for a tract of land in Letcher county owned by him, he paying her $50 in addition in the trade. This trade was proposed by her and her husband, and seems to have been much canvassed before it was made. The tract of land which William Ison swapped to her was of the value of $500, so that she got in the trade $550 for her patrimony. He knew that she was only 17 years of age, and took from her an affidavit that she would make him a deed after she became of age. Before deeds were made under this trade, she and her husband swapped the William Ison tract to Elijah Ison for a tract owned by him, and by agreement William Ison made a deed to Elijah Ison for his tract. Elijah Ison conveyed his tract to her, and she conveyed her interest in her father's land to William Ison. She and her husband settled on the tract of land conveyed to her by Elijah Ison, and subsequently, while she was still an infant, conveyed one-half of it to Joseph Holcomb, and made a deed to him for it. After all this, on July 1, 1891, she became of age. The deed which she had made to William Ison for her land had not been recorded, and R. N. Cornett proposed to her husband to pay him $1,100 for it. William Ison heard of this, and on the day that she was of age went to see her, asking her to make him a deed the next day. The next morning he went to see Cornett, telling him of his purchase of the land and requesting him to drop the trade, and offered him $100 to do this. Cornett said he did not want his money for nothing, and Ison told him if he bought the land he would buy a lawsuit. That day Cornett took to her house a deputy clerk, with a deed he had prepared for her to sign. Joseph Holcomb's wife was there with his deed for the purpose of getting that reacknowledged. The proof is conflicting as to which deed was signed first, but from all the evidence we conclude that it was in substance one transaction, and that both deeds should be treated as executed at the same time. Both were on the table together, and the proof leaves the mind in doubt as to which was acknowledged and delivered first. Cornett got his deed and paid the money, and Holcomb's wife got his. Both were properly acknowledged. William Ison was in possession of the land at the time. Cornett paid $1,100 for the land, $800 of it being paid in a stock of goods. Holcomb paid nothing for the acknowledgment of his deed. Pasha Ison and her husband were then living on the remainder of the tract conveyed to her by Elijah Ison, outside of the part conveyed by them to Holcomb, and continued to reside there. Before she became of age, William Ison had cut off the land she conveyed to him timber of the value of something over $200 and received the money for it. What she had received for the land conveyed to Holcomb is not shown. Cornett then filed this suit against William Ison to quiet his title to the land. William Ison answered, making his answer a counterclaim, and praying that his title be quieted. The case was submitted to the chancellor, who entered judgment in favor of Cornett, and William Ison appeals.

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[73] Accord: Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919 (1905); Stull v. Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741 (1888); Miles v. Lingerman, 24 Ind. 385 (1865). For full collection of authorities, see 18 Am. St. Rep. 679 (1890).

Suppose infant is unmarried when she makes a deed and is married after she comes of age, but before a reasonable time has elapsed for her disaffirmance; is her period of coverture excluded in calculating a reasonable time? Suppose now, the infant is unmarried when the deed is made, but marries before she comes of age; has she until after her coverture ceases to disaffirm? See Linville v. Greer, 165 Mo. 380, 398, 65 S. W. 579 (1901).

The proof leaves no sort of doubt that Cornett bought with full knowledge of the previous sale to William Ison and of his claim to the land. It also leaves no sort of doubt that Cornett paid for the land $1,100 in money and property. Each of them earnestly maintains that the other has no equity in his case. The stepfather evidently knowingly made a hard trade with his stepdaughter when an infant; but the husband urged the trade, and there was no fraud in it. Cornett bought with full notice of the prior claim of William Ison; also of the reacknowledgment of the deed to Holcomb, and that he was buying a lawsuit.

The deed of an infant conveying real estate, when any valuable consideration passes to him, is not void, but voidable only, and may be confirmed after his arrival at age by the reacknowledgment of the deed or conduct showing an election to stand by it. Hoffert v. Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. Law Rep. 732, and cases cited. After arriving at age he may disaffirm a contract made during infancy for the sale of real property, either executed or executory, by merely making another conveyance of the same property to a third person, and it it unnecessary for him to refund to the first person the consideration received in order to render the second conveyance valid. Vallandingham v. Johnson, 85 Ky. 289, 3 S. W. 173, 8 Ky. Law Rep. 940. The purchaser holding under a deed made by an infant cannot rely upon the champerty statute as against the second purchaser, as his holding is not adverse to the infant. Moore v. Baker, 92 Ky. 518, 18 S. W. 363, 13 Ky. Law Rep. 724. To same effect, see Freeman's note to Craig v. Van Bebber, 18 Am. St. Rep. 657, 703, 16 Am. & Eng. Ency. of Law, 288–293. The fact that Cornett had notice of the claim of Ison did not render his purchase void, for, as has been well said, the privilege of an infant to disaffirm his contract might be of little value to him if he were permitted to dispose of the property previously conveyed, to such persons only as had no notice of the prior conveyance. Jackson v. Burchin, 14 Johns. (N. Y.) 124; Clamorgan v. Lane, 9 Mo. 446. It has also been held that if an infant conveys his land, and on attaining his majority ratifies his conveyance, and then conveys to another person, for a valuable consideration, the first grantee not being in possession, the second grantee, having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land. Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224. The rule is thus well stated in 16 Am. & Eng. Ency. of Law, p. 287: "The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and, though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud."

Here Cornett had notice of all the facts, and bought with full knowledge of the situation; Ison, the prior purchaser, being in actual possession. But the infant had sold the land to Holcomb before her majority, and, as appears from the proof, had nothing at that time except the little place on which she resided. She was under no obligation to disaffirm her deed made to Holcomb. That deed was not void. It was only voidable. If she did not disaffirm it, it stood good. Ison, when she disaffirmed the deed made to him, could not demand of her, as a condition of that disaffirmance, that she should also disaffirm the deed made to Holcomb. Her acknowledgment, therefore, of the deed made to Holcomb after she became of age, deprived Ison of no legal right. She was under at least a moral obligation to Holcomb after she had disposed of the consideration received from him for the land conveyed to him. Her reacknowledgment of the deed put it out of her power thereafter to disaffirm it. But the same effect would have followed if she had remained silent and taken no action for the statutory period. Ison was in no worse condition after she reacknowledged that deed and disaffirmed his than he would have been if she had disaffirmed his without taking any action as to the Holcomb matter.

He would have no claim on the Holcomb land if she had not reacknowledged Holcomb's deed and simply allowed the matter to remain as it was. If she had sold the land to Holcomb after becoming of age a different question would be presented; but when she reacknowledged the deed to him she simply elected not to disaffirm it, as she had the legal right to do, and, no right of Ison being prejudiced thereby, he cannot complain. As it is the policy of the law to discourage persons from buying the property of infants, and also its policy to encourage persons to buy their property at full value after they become of age without fear of losses by reasons of contracts made during infancy, the interests of this class of persons require that bona fide purchases of their property for value after they have arrived at age should be upheld; for otherwise their property might be sacrificed, as in this case, by a sale at half its value during infancy, and after they arrived at age no one would be willing to buy from them and pay the value of the property.

Pasha Ison is not a party to this suit, and we cannot, therefore, determine her rights. But on the facts as presented the real equity of the case is not difficult to see. The disability of infancy is allowed by law as a shield, not as a sword. The infant may disaffirm his contract on becoming of age, and if, during his infancy, he has spent the consideration received, this is nothing more than the law expects of him; but if he still has the consideration, or its representative in money or property, he must, on disaffirming his contract, make restitution to the extent of the consideration still in his hands. Thus, if he gives his note for the price of personal property, and pleads infancy to the note, the title to the property revests in the vendor, and he may recover it in an action in trover. The same principles apply in the case of real estate. Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Henry v. Root, 33 N. Y. 526; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; 16 Am. & Eng. Ency. of Law, 293; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Brantley v. Wolf, 60 Miss. 433. William Ison was the girl's stepfather. She was small when her own father died, and had grown up in his home. He stood to her in loco parentis. In this situation, when she was 17 years of age, he traded her out of her patrimony for $550, and this land, after he had cut over $200 worth of timber from it, sold for $1,100 about four years later; thus showing that the land in its original condition would have been worth over $1,300. The law will not enforce in his favor a contract made with her by him, by which more than half her property was taken from her. The rule is that ratification, to be binding on the infant, must be voluntary—the act of a free mind, and not done under misapprehension. Note to Craig v. Van Bebber, 18 Am. St. Rep. 705. There was no intention on her part to ratify the deed to William Ison. Cornett paid the full value of the property, and a loss should not be thrown upon him. Still she cannot use her infancy as a sword, and the chancellor, on a proper application, can do justice between her and William Ison to the extent that she still retains the land that she got from him or its representative, charging him with what he has received from the timber cut off her land, and the reasonable rent while in his possession.

Judgment affirmed.

V. Obligation of Infant to Return the Benefit Received by Him or Its Equivalent, or to Suffer Deduction for the Benefit Received, or for Damages Caused the Defendant by Reason of the Infant's Disaffirmance

HOLMES v. BLOGG.

(Court of Common Pleas, 1818. 8 Taunt. 508.)

Assumpsit by the plaintiff to recover £157. 10s. paid by him during his infancy to the defendant. Plea, general issue. At the trial before Burrough, J., it appeared that in March, 1816, the plaintiff had entered into partnership with Taylor, an adult, and for the purposes of carrying on that trade the partners took a lease of certain premises from the defendant. The lease purported to be granted by the defendant in consideration of the payment of £315. paid by the plaintiff and Taylor. Of this sum £157. (the money to recover which this action was brought) was paid down to the plaintiff in the presence of Taylor. At the time of this transaction the plaintiff was an infant. He became of age in 1816 and on the day following that event he dissolved the partnership with Taylor. The plaintiff had never slept in the house after he became of age and his name was soon thereafter taken off the door. For the defendant it was contended that under these circumstances the plaintiff could not recover. Burrough, J., was of the opinion that the action was well brought, but reserved the point. The jury found for the plaintiff.

Copley, Serjt., obtained a rule nisi to set aside this verdict.[74]

And now, Gibbs, C. J., delivered the judgment of the Court. This was an action by Holmes against Blogg for money had and received; and the ground on which the plaintiff sought to recover is founded on the following facts. Holmes, an infant, together with Taylor, had agreed with the defendant to take the lease of his house, and to pay to him a certain sum of money for that lease. Part of the money was paid down, and security was given for the residue. In point of fact, the money paid was the money of Holmes, at that time an infant. The infant avoided the lease when he came of age, as he had a right to do; and, having avoided the lease, he brought this action for the money paid to the defendant, on the ground that the consideration having failed, he was entitled to recover it. There has been a good deal of argument on the subject of this avoidance, and, indeed, it has been treated as the main question; but another question arises, namely, whether, supposing the lease to have been avoided, the plaintiff could recover the money which he has paid for it during his infancy. I confess this action is quite new to me, and I thought, on principle, that it could not be maintained. I thought, too, that there was much in my Brother Copley's argument, that the money paid could not be taken to be the money of the infant alone, but that it must be taken to be the joint money of the infant and Taylor; and that, if it was paid as their joint money, it would be money advanced by Holmes in the first instance to the partnership of Holmes and Taylor, and then paid as partnership money by them to Blogg. But I think further, that, supposing this money to be the sole property of the infant, he cannot recover. He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it: the law does not enable him to do that. I cannot find this decided; for I cannot find that any such action as this has ever been brought; but Lord Mansfield has incidentally said that such an action cannot be brought. In the famous case of Drury v. Drury, 2 Eden, 39, one of the questions was whether an infant could, by contract, bar her dower. Lord Northington thought that the statute applied only to adults; and the marriage of Lady Drury with the Earl of Buckinghamshire took place on his opinion; but the case afterwards came before the House of Lords upon appeal, under the name of The Earl of Buckinghamshire v. Drury, Wilmot's Notes of Opinions and Judgments, 177, s. c. 3 Brown. Parl. Ca. (2d Ed.) 492, s. c. 2 Eden, 60, when the decree of Lord Northington as to this point was reversed. Lord Mansfield there said, in delivering his opinion, "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," 2 Eden, 72. What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back. But the authority does not altogether stop here. In Lord Chief Justice Wilmot's Notes of Opinions and Judgments, 226, it appears that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the judges; in which majority the learned author, then Mr. Justice Wilmot, was. His note of Lord Mansfield's judgment on this point is in these words: "If an infant pays money with his own hand without a valuable consideration, he cannot get it back again." Wilmot's Notes, 226, note. So that Lord Chief Justice Wilmot had himself taken a note of this declaration of Lord Mansfield, and laid it up among his memoranda, without any expression of disapprobation. He must, therefore, be taken to have adopted it.

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[74] Statement abridged, and made up in part from facts as given in Holmes v. Blogg, 8 Taunt. 35 (1817).

We, therefore, think that this action cannot be maintained, upon the ground that the infant, having paid the money with his own hand, cannot recover it back again.

The other ground taken by my Brother Copley, namely, that this was the money of the partnership, my Brother Burrough tells me was not taken at Nisi Prius. We do not, therefore, decide on that ground.

Rule absolute for a nonsuit.[75]

DALLAS, J., who was absent on account of illness, concurred in this judgment. Ex relatione GIBBS, C. J.

HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING CO.

(Supreme Court of Judicature, Chancery Division, 1894. L. R. 3 Ch. 589.)

Adjourned summons.

The Vaughan-Sherrin Electrical Engineering Company, Limited, was registered on the 16th of August, 1890, under the Companies Act of 1862. On the faith of a prospectus issued by the company the Plaintiff, Miss Hamilton, who was then of the age of eighteen, applied for shares, and paid £20, the amount payable on application. On the 6th of October, 1890, twenty ordinary shares of £5. each were allotted to her, and on the 18th of October she paid £40., being the amount payable on allotment. Her name was duly entered on the register as the holder of the shares.

On the 18th of November, 1890, she wrote a letter to the secretary of the company withdrawing her application and requiring payment of the £60. paid by her to the company, but received no answer. She attended no meeting of the company, nor did she receive any dividends on the shares. On the 19th of May, 1892, she, by her next friend, issued the writ in this action, claiming (1) a declaration that the allotment of the twenty shares standing in her name in the register of shareholders of the Defendant company was void; (2) that the register of the company might be rectified by striking out the name of the Plaintiff as a shareholder in respect of the said twenty shares; (3) that the Defendant company might be ordered to repay to the Plaintiff the sum of £60. paid by her to the company in respect of the shares, together with interest at 5 per cent.; and (4) that the Defendant company might be restrained by injunction from enforcing any call made, or to be made, on the Plaintiff in respect of the shares.

On the 10th of June, 1892, the company went into voluntary liquidation, and on the 27th of June the liquidator removed the Plaintiff's name from the register of shareholders.

The action now came on upon a summons in the winding-up, for the purpose of obtaining the decision of the Court upon the question whether the Plaintiff was entitled to the return of the £60. paid by her to the company.

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[75] Accord: Valentine v. Canali, L. R. 24 Q. B. D. 167 (1889), infant recovered the purchase price of chattel sold to him.

STIRLING, J. [after stating the facts, continued]:

The case now comes on in order that I may decide whether or not the Plaintiff is entitled to a return of £60. paid by her to the company. This is claimed on the ground that there has been a total failure of consideration.

Three cases have been cited before me on this point. The first is Holmes v. Blogg, 8 Taunt. 508, 511. There the plaintiff brought an action to recover a sum paid by him during infancy to the defendant, who was lessor to the plaintiff and to one Taylor, with whom the plaintiff was in partnership. The lease was granted to the plaintiff and Taylor, and £157. 10s. was paid by the plaintiff as a premium. Under the lease, Taylor and the plaintiff occupied the premises for three months. The infant afterwards avoided the lease, and then brought an action to recover the premium. Gibbs, C. J., in delivering the judgment of the Court, refers to an expression of opinion by Lord Mansfield in the House of Lords, where he says: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," and it was held that the infant was not entitled to recover. In Ex parte Taylor, 8 D. M. & G. 254, which was a case of a very similar nature, an infant had entered into an agreement for a partnership, and paid a premium on entering. He devoted much time to the business, and received an allowance weekly, amounting altogether to £172., but before he came of age he disaffirmed the contract. It was held that he could not prove for the premium in the bankruptcy of his late partner, on the ground that the contract had been part performed on each side, and the consideration had not wholly failed. The former of those two cases was considered in Corpe v. Overton, 10 Bing. 252. In that case the plaintiff, while an infant, signed a written agreement to enter into a partnership which was not to commence at once, but at a future date, and he paid down £100. as deposit. Between the date of the agreement and the date when the partnership was to commence the plaintiff came of age, revoked the agreement and rescinded the contract, and brought an action to recover the deposit. In opposition to his claim Holmes v. Blogg, 8 Taunt. 508, was relied upon, but the whole of the Judges composing the Court distinguished that case. Tindal, C. J., said (10 Bing. 255): "In Holmes v. Blogg, the infant had paid £157. as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the Chief Justice in delivering his judgment, yet when he comes to apply them to the subject before the Court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on: 'What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.' The ground, therefore, of the judgment in Holmes v. Blogg, 8 Taunt. 508, was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before." Then, after discussing the facts in that case, he adds (10 Bing. 257): "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to Holmes v. Blogg is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and in the meanwhile the infant had derived no advantage whatever from the contract." And he held that the infant was entitled to recover. Gaselee, J., said: "I consider the present case as clearly distinguishable from Holmes v. Blogg." Bosanquet, J., said: "We are far from impeaching the judgment of the Court in Holmes v. Blogg, as applicable to the facts of that case. There, the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage. There is no reason, therefore, for finding fault with that decision. It is however, a general rule, that upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed." And Alderson, J., said (10 Bing. 259): "In this, the case is clearly distinguishable from Holmes v. Blogg. Here the infant has had no enjoyment of any advantage from the contract: In Holmes v. Blogg he had enjoyment, for a period, of premises demised to him; and so far was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment."

It is to be observed that all the learned Judges who dealt with the case distinguished it from Holmes v. Blogg, 8 Taunt. 508, on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract.

In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the Company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of Corpe v. Overton, 10 Bing. 252. The consideration has totally failed and the Plaintiff is entitled to recover, i. e., to prove for the amount in the winding-up.[76]

CLEMENTS v. LONDON & NORTH WESTERN RY. CO.

(Court of Appeal. L. R. [1894] 2 Q. B. Div. 482.)

Lord ESHER, M. R. In this case the plaintiff, while under age, became a porter in the employment of the London and North Western Railway Company. He so continued for some time, and then an injury was caused to him in the course of the working of the railway. He has brought an action against the railway company claiming damages, either at common law or under the Employer's Liability Act, on account of the injuries that he has received. The answer given by the defendants to this claim is, that at the time when the plaintiff entered their employment as servant he, as part of the contract of service, agreed that if during the employment any injury arose to him, whether from the negligence of the servants of the company or not, and without any inquiry on this point, he should be compensated in one of two ways, either by a payment during the time which he should be sick or disabled, or in case of permanent injury or death by payment of a fixed sum to him or his representatives respectively. The defendants say that the plaintiff as part of his original contract of service accepted those terms, and at the same time undertook that in such a case he would not look to the company for damages, but would take the agreed compensation under that contract.

At the time when the plaintiff entered into this contract he was an infant, and he was still an infant at the time of the accident, and at the time of action brought. He received under that contract payment in accordance with its terms, and without having to shew how the accident arose; but subsequently he brought this action. It is said that the receipt of that money is not to be taken into account, so that what he is claiming is to keep that money, and further to recover full compensation in respect of the injury that had happened to him, as if there were no such contract in existence, and as if he had received no compensation or advantage under it.

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[76] A fortiori, in all cases where the infant does restore the whole consideration, or if he has received none, he can recover the consideration paid by him. Vanatter v. Marquardt, 134 Mich. 99, 95 N. W. 977 (1903); Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429 (1877); Cooper v. Allport, 10 Daly (N. Y.) 352 (1882); House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189 (1886); Pyne v. Wood, 145 Mass. 558, 14 N. E. 775 (1888); Sparman v. Keim, 83 N. Y. 245 (1880); Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640 (1879); Holt v. Holt, 59 Me. 464 (1871); Ruchizky v. De Haven, 97 Pa. 202 (1881); Mordecai v. Pearl, 63 Hun, 553, 18 N. Y. Supp. 543 (1892); Robinson v. Weeks, 56 Me. 102 (1868); Clark v. Tate, 7 Mont. 171, 14 Pac. 761 (1887); Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88 (1896); Fox v. Drewry, 62 Ark. 316, 35 S. W. 533 (1896); Featherstone v. Betlejewski, 75 Ill. App. 59 (1897); Shipley v. Smith, 162 Ind. 526, 70 N. E. 803 (1904); Jones v. Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043 (1904).

That raises this question of law—whether this is a contract which he can now repudiate, he being still an infant. I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate.

It is for the Court under these circumstances to say what is the construction of the contract, and after it has been construed to say whether it is clearly and manifestly for the benefit of the infant. About the construction there can be no doubt; so the question is whether this Court ought to say with the county court and the Divisional Court that this contract was for the benefit of the infant, or to take the opposite view. A Court of Law would know perhaps better than a jury could what advantages the plaintiff obtained under the contract of service, because I take it it is part of the contract of service made by him with the defendants. If there were no such contract, he could not obtain compensation, unless by agreement with his employers, without bringing an action either in the superior court or the county court, and in that action he would be exposed to the risk of being unable to prove that the accident was the result of negligence of some one for whom the company were responsible. The injuries might, for instance, have arisen from concealed defect of machinery not known to the company, or by pure accident not brought about by any negligence on the part of the company's servants. The burden of proving that it was otherwise would have been on the plaintiff, and that is a burden which often cannot be supported. Even if the plaintiff were successful in shewing this and obtained judgment, and the defendants had to pay his costs, it is a matter of common knowledge that the plaintiff would have to incur extra costs beyond those that he would recover. Such extra costs would have to be paid out of the damages which he would recover; and we all know that in a majority of the cases in which only small damages are recovered those damages are seriously encroached on in meeting the extra costs.

The risk of non-success owing to difficulty of proof, and the risk of obtaining but small advantage from a successful action, are both obviated by this agreement, under which, even if it is clear that there is no legal claim which could be enforced against the company, he is still entitled to compensation. Some disadvantages to the infant have been pointed out in the contract; but it does not prevent the contract being for the advantage of the infant that it contains some things that are not to his advantage. If upon consideration of the whole agreement there is a manifest advantage to the infant, he cannot avoid it. Under the circumstances of this case, I have come to the conclusion that the contract was for the benefit of the plaintiff, and binding on him, and its existence is therefore an answer to the claim made in this action. The appeal will, therefore, be dismissed.

KAY, L. J.[77] * * * It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the Court before which the question comes will not allow the infant to repudiate it. * * *

The plaintiff seems to have been in the employment of the company for a week, and then to have signed the form which made him a member of the insurance society. We are told that this is made a condition of service by the company. I think, therefore, that the case has been rightly treated on the footing that this was part of the terms of a labour entered into between the plaintiff and the company, and I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract. * * *

Suppose, however, as has been argued, that this is not a labour contract, would the same rule apply? I will not attempt to say how far the rule extends, but that it does apply to some contracts that are not contracts of labour is clear from many decided cases. One of the earliest of these was Earl of Buckinghamshire v. Drury, 2 Eden, 60, which came in the first place before Lord Henley when Lord Chancellor. Drury v. Drury, 2 Eden, 39. That was a case of a settlement made by a young lady who was about to marry. She was entitled to certain property, and a settlement was made which she executed which provided that the settlement should be in lieu of dower. The argument was that that is a thing about which an infant could not bind herself, and that the contract was void. The case went to the House of Lords, and the judgments of Lord Hardwicke and Lord Mansfield are given in the second volume of Eden's Reports, p. 60, and the House of Lords, after considering the agreement and seeing that upon the whole it was for the benefit of the infant, supported it and held her bound by it. Buller, J., in Maddon v. White, 2 T. R. 159, referring to that case, said this: "Lord Mansfield, in the case of Drury v. Drury (see Earl of Buckinghamshire v. Drury, 2 Eden, 60), laid it down as a general principle that if an agreement be for the benefit of an infant at the time, it shall bind him. Lord Hardwicke afterwards adopted this rule." * * *

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[77] Parts only of the opinions of Kay and A. L. Smith, L. JJ., are given.

Even if this contract were not, as I think it is, a contract concerning the terms of employment of the infant, I think it would come within the rule that I have been discussing, and that the Court might say that the contract was for the benefit of the infant, and elect for him, while he is an infant, to confirm it, treating it as not being a void contract but at most only voidable.

A. L. SMITH, L. J. * * * Under these circumstances, we have to consider whether the suggestion that this contract did not bind the infant is or is not correct. There can be no doubt that prima facie an infant is incapable of contracting; but to this rule there are exceptions, and I will read from the judgment of Fry, L. J., in De Francesco v. Barnum, 45 Ch. D. 430, the one applicable to this case. The learned judge having stated the general rule as to the incapacity of an infant to bind himself and enumerated some of the exceptions, said: "There is another exception which is based on the desirableness of infants employing themselves in labour, therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be, primâ facie, binding upon an infant." I take this to be good law. Primâ facie, therefore, this contract is binding upon the plaintiff. It is for the Court, and not for the jury, to determine, as we have already held in Flower v. London and North Western Ry. Co., [1894] 2 Q. B. 65, whether the contract is for the benefit of the infant; and if the Court should be of opinion that the agreement as a whole is not for his benefit, but that it is unfair that he should be bound by it, then the Court says that it is not binding on him. * * *

In my judgment, it is a fair contract for the infant. First of all, no matter how the accident may happen to him, and whether he has a remedy in a Court of Law or not, he is to have payments made to him according to the scale set out in the rules of the society. He avoids litigation, and having, if successful in litigation, to pay costs as between solicitor and client out of the damages he may recover. He avoids also the uncertainty of getting a verdict and the difficulty of establishing a cause of action. In my judgment, the agreement, instead of being detrimental to the infant, is, on the whole, manifestly to his advantage. The answer which is set up to this agreement, therefore, fails, and the appeal should be dismissed.

Appeal dismissed.[78]

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[78] In Mattei v. Vautro, L. T. 682 (1898), it was held that an infant's release of a cause of action for 30s., not being for his advantage, did not preclude his recovering judgment upon the original cause of action. Kennedy, J., said: "Now I cannot help thinking that I ought not to give effect to such an agreement as this, looking generally to the position of affairs, for if he

FELLOWS v. WOOD.

(Supreme Court of Judicature, Queen's Bench Division, 1888. 59 Law T. [N. S.] 513.)

This was an appeal from the decision of the judge of the County Court of Greenwich.

The defendant, when an infant, contracted with the plaintiff, who was a dairyman, to enter his service on the following terms: The plaintiff was to pay the defendant a salary of £1. a week. The defendant was to serve the plaintiff, and was not to serve the plaintiff's customers for his own benefit during the time he remained in the plaintiff's employment or for two years afterwards. Two weeks' notice was to be given on either side in case of the termination of such employment. The defendant left the plaintiff's service without having given him two weeks' notice, and commenced serving the plaintiff's customers for his own benefit. The plaintiff proceeded against the defendant in the County Court, and claimed damages for breach of the agreement, and an injunction.

The County Court judge found that the defendant had entered into the contract, and that it was a beneficial contract for him, but held that, as it was not for necessaries, it was voidable, and therefore void under section 1 of the Infants' Relief Act 1874 (37 & 38 Vict. c. 62).

The plaintiff appealed.

Section 1 of the Infants' Relief Act 1874 provides as follows:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

MANISTY, J. This is an appeal from the decision of the County Court judge of Greenwich, refusing to grant an injunction to restrain the breach of an agreement by which the defendant agreed not to serve the plaintiff's customers for a period of two years after he had left the plaintiff's service. The whole matter depends upon whether the contract was, or was not, a beneficial one for the infant to enter into. The County Court judge found as facts, first, that the defendant signed the agreement, and secondly, that the agreement was for his benefit, but that it was not for necessaries, and was voidable, and there-

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had settled he would have been liable to indemnify his next friend. I cannot say knowing his liability that it was a compromise for the infant's benefit and therefore I cannot hold the agreement as a bar to the plaintiff's claim."

fore void under section 1 of the Infants' Relief Act 1874. I do not see how the County Court judge came to the conclusion that this case came within that section, or that it was voidable. I think that he was in error, and that it does not come within the Infants' Relief Act 1874. I consider that this contract was decidedly beneficial to the defendant; the notice the plaintiff was obliged to give was short, but the salary was reasonable, and the defendant had the opportunity of learning his business, and had plenty of time to get to know all the plaintiff's customers; so, for this reason, the plaintiff was justified in binding him not to serve them for two years after leaving him. I think that the County Court judge was wrong in the view he took of the law on the subject. In the case of Leslie v. Fitzpatrick, 37 L. T. Rep. (N. S.) 461, 3 Q. B. Div. 229, Lush, J., in his judgment, says: "Whether the provisions of the agreement are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labour contracts, or were, in the then condition of trade, such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself. If, on the other hand, advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound." This appears to me to be the correct principle, and there can be no doubt that an infant may enter into a contract which is beneficial to himself, and is bound by it. The injunction sought for must be granted.

STEPHEN, J. I am of the same opinion. I approve of the principle laid down in Leslie v. Fitzpatrick, and think that judgment must be entered for the plaintiff, and an injunction granted.

Appeal allowed.[79]

HILLYER v. BENNETT.

(In Chancery, New York, 1838. 3 Edw. Ch. 222.)

Bill to set aside an assignment. It appeared from the bill that the complainant while a minor entered into a partnership with Ebenezer G. Bennett; that by certain articles of dissolution their effects were assigned to the defendant John C. Bennett in trust to pay $500.00 to a person named and to divide the residue between the complainant and Ebenezer. The case came up before the Court on pleadings and proofs.

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[79] Accord: Evans v. Ware, 3 Ch. 502 (1892); Morrison v. Fletcher, 17 T. L. Rep. 95 (1900); Harbison v. Mawhinney, 8 Pa. Dist. R. 697 (1899); Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. Supp. 458 (1906).

THE VICE-CHANCELLOR [WILLIAM T. MCCOUN].[80] The object of the bill in this case is, not to settle the partnership accounts between the complainant and E. G. Bennett, nor to call J. C. Bennett to an account for the surplus of the assigned property under the assignment which the partners executed to J. C. Bennett, to secure him against the five hundred dollar note, but, to set aside the assignment and to have the goods restored to the complainant, on the ground of his nonage, as well during the co-partnership as at the time of the assignment. * * *

Then, with respect to his nonage: the complainant's counsel is mistaken in saying that the acts and deeds of an infant are void in law. They are not void, but voidable only, at his election: Roof v. Stafford, 7 Cow. 179; s. c. in error, 9 Cow. 626; Eagle Fire Company v. Lent, 1 Edw. Ch. 301; Merchants Fire Insurance Company v. Grant, 2 Edw. Ch. 544. If a party is sued at law or in equity, he may plead or set up his infancy in bar, and thus avoid his contract, for he then makes his election to do so. So, it seems, in regard to personal property which he has agreed to sell and deliver, he may, under certain circumstances, disaffirm the contract and bring trover to recover it back: Stafford v. Roof, supra. But if, after he comes of age, he seeks to disaffirm and avoid his contract in a court of equity and files his bill there for the purpose of obtaining its aid, in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back; especially, if it appears that the other dealt with him in ignorance of the fact of his nonage. This equitable and just principle is recognized by Woodworth, J., Roof v. Stafford, 7 Cow. 183, and is warranted by several cases there cited.

The complainant is not entitled to have the assignment set aside and cancelled, without submitting to pay and offering to pay the note or, at least, one half of it; and, as he has not offered to do this, the court will not interfere with the assignment and the legal rights of the defendant J. C. Bennett under it. * * *[81]

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[80] Statement abridged and parts of the opinion omitted.

[81] Accord: Gray v. Lessington, 2 Bosw. (N. Y.) 257 (1857); Smith v. Evans, 5 Humph. (Tenn.) 70 (1844), case of sale of land by infant; Bozeman v. Browning, 31 Ark. 364 (1864), semble; Cummings v. Powell, 8 Tex. 80 (1852); Folts v. Ferguson, 77 Tex. 301, 13 S. W. 1037 (1890).

BARTHOLOMEW v. FINNEMORE.

(Supreme Court of New York, 1854. 17 Barb. 428.)

This was an action brought before a justice of the peace, to recover the value of a wagon, a promissory note for $30, and a bank note for $5, which the plaintiff alleged were his property, and that the defendant had converted them to his own use. On the trial in December, 1852, it appeared that the plaintiff was 20 years of age. That in March of that year, his father "gave him his time," and he went into the blacksmith's business. In October, 1852, he bought a horse of the defendant and paid him, therefore, a wagon, a note for $30, payable to the father of the plaintiff, and signed by C. and C., and $5. The father of the plaintiff was present at the trade and indorsed the note of C. and C.; the defendant insisting that he should do so, and let his son have some money. After the plaintiff had kept the horse about one month, he tendered him back to the defendant and demanded the wagon, note and money he had given in exchange for him; but the defendant refused to receive the horse or return the other property. There was proof on the part of the plaintiff tending to show that the horse was "balky" when the plaintiff took him; and on the part of the defendant, to show that the plaintiff had misused him, and that he had, in consequence, greatly depreciated in value after the plaintiff took him, and before he was tendered back. The cause was tried by a jury, who found a verdict for the defendant. The judgment was reversed by the county court of the county of St. Lawrence, and the defendant appealed.

BY THE COURT—HAND, P. J. It is quite evident that the trade between the parties was made with the knowledge of the father of the plaintiff, and with his consent. He knew of it, was present, and indorsed the note which was part of the consideration given for the horse; and furnished some money, which was probably paid by the plaintiff on that occasion. If so, as he was the natural guardian of the plaintiff, I am inclined to think it disposes of an objection suggested by Jones, Chancellor, in Stafford v. Roof, 9 Cow. 626, that an infant can make no contract during his wardship. Indeed, I do not find that the objection has prevailed.

Generally, a contract can be rescinded in toto by one of the parties, only where the other can be placed in the same situation he occupied when the contract was made. Chit. on Cont. 636; Hunt v. Silk, 5 East, 449; Hogan v. Weyer, 5 Hill, 389; Vorhees v. Earl, 2 Hill, 288, 38 Am. Dec. 588; Bradley v. Bosley, 1 Barb. Ch. 125; Blackburn v. Smith, 2 Exch. R. 783; Reed v. Blandford, 2 Y. & J. 278; Fitt v. Cassanet, 4 M. & G. 898. And if the rescission is on the ground of fraud, it must be done promptly and unreservedly. Masson v. Bovet, 1 Denio, 74, 43 Am. Dec. 651. But the jury must have found the defendant had not been guilty of fraud; and also that the horse had been misused by the plaintiff, and was of less value when tendered back, than at the time of the trade. There was evidence to that effect, and one witness testified that the depreciation was one half of his value. And it appears the plaintiff knew of the supposed defects of which he now complains, within a few days after he took the horse. The only question then is, whether the plaintiff, being an infant, could rescind or avoid the contract, and recover back the property, under these circumstances.

Nearly all of the contracts of an infant, except for necessaries, are voidable at his election. And the better opinion seems to be, that his executory contracts, and contracts of sale of his personal property, may be avoided during his minority. Stafford v. Roof, 9 Cow. 626; Bool v. Mix, 17 Wend. 132, 31 Am. Dec. 285; Corpe v. Overton, 10 Bing. 252; Railway Co. v. Coombe, 3 Exch. R. 565, 5 Bac. 606; Millard v. Hewlett, 19 Wend. 301; Co. Litt. 380, a. Though that has been doubted, where he sells chattels and delivers them with his own hand. Fonda v. Van Horne, 15 Wend. 635, 30 Am. Dec. 77; Roof v. Stafford, 7 Cow. 179.

But, admitting he can do this during his minority; in the case now under consideration, the contract was executed; and there are several decisions, that if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it and recover back the money, or claim a return of the property, without restoring to the other party the consideration received from him. Holmes v. Blogg, 8 Taunt. 508; s. c., 2 Moore, 532; recognized in Corpe v. Overton, 10 Bing. 252; Farr v. Sumner, 12 Vt. 28; Roof v. Stafford, 7 Cow. 182; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Chitt. on Cont. 147. And see Medbury v. Watrous, 7 Hill, 114, and cases there cited; 2 Kent, 240; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; North Western R. Co. v. McMichael, 5 Exch. R. 114, and note to American edition; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Story on Cont. § 62. In Newry, &c., R. Co. v Coombe, 5 Exch. R. 565, the infant had received no advantage whatever. It has been a question, whether he can be sued for what he receives upon an executory agreement after he avoids it. Reeves' Dom. Rel. 243 et seq.; Woodworth, J., Roof v. Stafford, 7 Cow. 182. However that may be, after he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration; or, at least, an equivalent. This the plaintiff did not do, nor offer to do, in this case. He had the use of the horse for some time; and probably, by improper treatment, reduced him to one half of his former value; for all of which he offered no compensation.

The judgment of the county court should be reversed, and that of the justice affirmed.

Ordered accordingly.

GREEN v. GREEN.

(Court of Appeals of New York, 1877. 69 N. Y. 553, 25 Am. Rep. 233.)

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 7 Hun, 492.)

This was an action of trespass upon lands. The defendant among other things pleaded title. The facts found were substantially as follows:

On the 8th day of March, 1866, the defendant, being then the owner of the premises in question and plaintiff, being an infant of the age of about eighteen years, in consideration of the sum of $400.00 to him paid by the plaintiff, sold and conveyed to the plaintiff, who was his father and knew his infancy and actual age, the said premises, and thereupon entered into possession thereof and has since occupied the same. Prior to the defendant's obtaining his majority, he had wasted or otherwise ceased to possess the purchase price of said premises, and at that time was possessed of no property whatever excepting said land. On or about May 1st, 1873, the defendant re-entered upon said premises with the purpose and with notice of his intent to disaffirm the deed, and the alleged trespasses were those done in and about such re-entry.

Church, C. J. The important question in this case is whether it was necessary for the defendant to restore the consideration received for the transfer of the land to the plaintiff to entitle him to rescind the contract. [After reciting the facts, the Chief Justice continued:] After a careful examination of the authorities and the conflicting opinions below, we are inclined to concur with the opinion of Gilbert, J., in affirmance of the judgment. We do not deem it profitable to review the authorities upon the question, and do not intend to extend our decision beyond the principal facts involved in this case.

There are expressions of judges, and general rules laid down by text writers, and some cases which seem to favor the doctrine contended for by the appellant, but in nearly all of them there is a manifest distinction in the facts. The weight of authority is to the contrary effect. Tucker v. Moreland, 10 Pet. 58, 74, 9 L. Ed. 345; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101. These and like authorities, we think, accord with the general principles of the law for the protection of infants. The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. A person purchasing real estate of an infant, knowing the fact, and especially the father, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity. The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle we think a restoration of the consideration could not be exacted as a condition to a rescission on the part of the defendant.

Mere acquiescence for three years after arriving at age without any affirmative act was not a ratification. Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 Johns. 124; Boody v. McKenney, 23 Me. 517. The entry made by the defendant in this case for the purpose of disaffirming the contract with notice of such intention was sufficient to entitle him to recover. Bool v. Mix, 17 Wend. 120, 31 Am. Dec. 285.

The judgment must be affirmed.

All concur; ANDREWS, J., absent.

Judgment affirmed.[82]

RICE v. BUTLER.

(Court of Appeals of New York, 1899. 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703.)

HAIGHT, J. The appeal in this case is based upon the certificate of the Appellate Division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the Municipal Court of Syracuse to recover the sum of $26.25, paid by the plaintiff, a minor seventeen years of age, upon a contract for the purchase of a bicycle. The contract price was $45; $15 were paid upon the execution of the contract, and the remainder was to be paid in weekly installments of $1.25. The plaintiff purchased the wheel in June and used it until about the 20th of September and then returned it to the defendant, asserting that she had been defrauded, and demanded repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show that the use of the wheel and its deterioration in value equalled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

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[82] Accord: Kane v. Kane, 13 App. Div. 544, 43 N. Y. Supp. 662 (1897); Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464 (1899); Pennsylvania Co. v. Purvis, 128 Ill. App. 367 (1906).

It is now contended that the contract was executory, and that being such the plaintiff had the right to rescind and recover back the amount paid. The Appellate Division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but in so far as the payments made were concerned the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (volume 2, p. 240), says: "If an infant pays money on his contract and enjoys the benefit of it and then avoids it when he comes of age he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other." In the case of Gray v. Lessington, 2 Bosw. 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration."

In the case of Medbury v. Watrous, 7 Hill, 110, an action was brought by an infant to recover for services performed, of the value of $70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of $600. He had not entered into the possession of the house and lot and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a quantum meruit for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of Holmes v. Blogg, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised, while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is, that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case and as found by the trial court, the use equalled the sum paid. Our attention has been called to the cases of Pyne v. Wood, 145 Mass. 558, 14 N. E. 775, and McCarthy v. Henderson, 138 Mass. 310, but we think the rule suggested by us is more equitable and that they should not be followed.

The judgment of the Appellate Division should be reversed and that of the trial and County Court affirmed, with costs, and the second, third and fourth questions certified to us answered in the affirmative. An answer of the first question is not deemed necessary further than intimated in the opinion. All concur.

Judgment reversed, etc.[83]

MILLER v. SMITH.

(Supreme Court of Minnesota, 1879. 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.)

Appeal by defendant from an order of the district court of Nobles County, Dickinson, J., presiding, refusing a new trial. The complaint is not only for an alleged wrongful taking originally, and an unjust detention, but for a subsequent conversion of the property after demand.

The plaintiff, an infant, being indebted to one Law upon a promissory note of $40, part purchase money of a pony, made a loan of the defendant which he mostly used in paying up that note. To secure this loan, he gave the defendant his note, secured by a chattel mortgage upon the pony and a yoke of oxen, of which the note and mortgage were renewals. No delivery of the mortgaged property was ever made by the plaintiff to the defendant, but they were taken from his possession and without his consent upon default of the conditions of the mortgage, and sold on foreclosure; the defendant bidding them in himself. The plaintiff thereupon gave notice of his disaffirmance of the note and mortgage and demanded possession of the property. For the refusal this action was brought. The defendant asked the court to charge as follows: "The plaintiff, if a minor, could not disaffirm the sale by mortgage to the defendant, and reclaim the mortgaged property in question as received by it, without returning the money secured by it." This the court refused, and thereupon instructed the jury that, "if they should find the plaintiff to be a minor, still he may recover in this action, without returning or offering to return to defendant the consideration secured by the mortgage in question, or the money by him borrowed of defendant." To this refusal and instruction the defendant excepted.

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[83] Accord: Pierce v. Lee, 36 Misc. Rep. 870, 74 N. Y. Supp. 926 (1901).

CORNELL, J.[84] [after stating the facts substantially as above, and after holding that the money borrowed by the plaintiff was not for necessaries, continued as follows:]

It was clearly inequitable and disadvantageous to his interests. But whether void, or voidable only, is, perhaps, an immaterial inquiry, for the reason that the point of the defendant's objection to the refusal and instruction does not rest upon the proposition that the plaintiff could not legally avoid the note and mortgage in question, and reclaim his property, but that he could not do so without returning the amount of the loan.

If an infant can borrow money upon mortgage security upon his property, without any reference to his necessities, and cannot, upon reaching the age of legal discretion and capacity, or before, repudiate the transaction, except upon the condition of returning the amount of the loan whether he has it or not, this privilege, which the law accords to infancy for its protection, will generally be of little benefit. Under the operation of such a rule, money lenders would soon become permanently possessed of the property of infant spendthrifts, for with them the temptation to borrow for immediate gratification is generally too great to be resisted. Its adoption as a rule would be in violation of the principle of protection that underlies the whole doctrine of the law pertaining to the dealings and contracts of infants.

In the case at bar it is not shown that the plaintiff retained any portion of the borrowed money at the time he gave notice of disaffirmance to defendant, and demanded a return of his property; but it affirmatively appears that he had already spent most of it in taking up the law note. Under these circumstances, an offer to return the loan or pay it was not necessary to enable him to reclaim his property, or to maintain this action. Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732; Walsh v. Young, 110 Mass. 396; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117. * * *

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[84] Statement abridged and part of opinion omitted.

Order affirmed.[85]

JOHNSON v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court of Minnesota, 1894. 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.)

Appeal by the defendant, the Northwestern Mutual Life Insurance Company, from an order of the District Court of Hennepin County, Seagrave Smith, J., made August 16, 1893, overruling its demurrer to the complaint.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson, then of Stoughton, Wis., in the sum of $1,000. By its policy it agreed to pay him that sum twenty years thereafter, or in case of his death meantime to pay it to his representatives or assigns sixty days after due proof of his decease. After ten years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid he was entitled to a paid-up nonparticipating policy for as many twentieth parts of the $1,000 as he had paid annual premiums. He paid $23.29 on that date and agreed to pay a like sum every six months thereafter. He was then but seventeen years of age. He paid seven of these semiannual installments, in all $186.32. On December 19, 1892, immediately after he became of age, he served written notice on the Insurance Company that he elected to avoid the policy and offered to return it, and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts, and a copy of the policy was attached. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

Buck, J., delivered the opinion of the Court in favor of the respondent, and the order appealed from was affirmed. On re-argument the following opinions were filed:

Mitchell, J. This case was argued and decided at the last term of this court. 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187, 45 Am.

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[85] Accord: Dawson v. Helmes, 30 Minn. 107, 113, 14 N. W. 462 (1882), infant's sale of real estate avoided.

In the following cases it was held that the burden was on the defendant to show that the infant has any part of the consideration which he obtained still in his possession at the time of disaffirmance and attempt to recover: Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732 (1855); Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788 (1905). See, also, St. Louis Ry. Co. v. Higgins, 44 Ark. 293 (1884); Napier v. Chappell, 62 S. W. 21, 22 Ky. Law Rep. 1904 (1901).

St. Rep. 473. A reargument was granted for the reasons that although the amount was small the legal principles involved were important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of $5,000, should, from time to time, buy and pay for $100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the $100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessaries. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessaries, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries:

First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on the part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in

England that he cannot. This was held in the leading case of Holmes v. Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini v. Canali, 24 Q. B. Div. 166. Some obiter remarks of the chief justice in Holmes v. Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corpe v. Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits.

In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in Holmes v. Blogg. Leake,—a most accurate writer,—in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Breed v. Judd, 1 Gray (Mass.) 455. But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessaries. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendency which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury v. Watrous, 7 Hill (N. Y.) 110; Sparman v. Keim, 83 N. Y. 245; and Heath v. Stevens, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured ($1,000) as there have been annual premiums so paid.

The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy for $200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds.

Order affirmed.

Buck, J., absent, sick, took no part.

Gilfillan, C. J. I dissent, and especially from the proposition that in any case the contract of a minor is presumed to be fraudulent on the part of the other party to it. If two minors contract together, each may avoid the contract. Is that because each is presumed to have fraudulently drawn the other into making it? If a contract be wholly executory when the minor seeks to avoid it, will any amount of proof that it is advantageous to him, and made in good faith and honesty on the part of the adult, prevent the minor avoiding it? If wholly executory when made, will the subsequent performance raise a presumption that it was fraudulent when made?

A minor's contract, except for necessaries, is voidable by him only because he is, in law, incapable to bind himself. When he seeks to avoid a contract the question arises, on what conditions shall he do so? In such cases there are two considerations—First, to afford him full protection from the consequences of his own incapacity; second, that being done, to prevent him making his legal incapacity a means to defraud others.

If the contract be wholly executory, both ends will be attained by allowing him to repudiate it, which will leave both parties as they were before it was made. But suppose it partly performed on both sides? He may undoubtedly avoid further performance. But if he takes the aggressive, and seeks to recover what he has parted with in performance, what then? The authorities are agreed that, if he have in specie what he received under it, he must restore it, as a condition of recovering what he parted with. The disagreement in the authorities is in cases where he cannot restore the benefits he has received; where he has expended them, or they are of such a character that they cannot be restored. I am speaking only of contracts relating to the personalty.

Since the first argument of this cause, I have come to the conclusion that whether, when he cannot restore what he has received, he may recover what he has parted with, will depend on the character of the contract. If from the subject-matter or terms of the contract, it is a wasting of his estate, so that to require him to restore what he has received will likewise waste his estate, it will not be required of him. But if the contract be, both in subject-matter and terms, a provident one,—advantageous to the minor,—the court, to prevent a fraud on the other party, unnecessary to his protection, will not permit him to recover what he has parted with without setting off against it what he has received.

Such is this case.[86]

CHANDLER et al. v. SIMMONS.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 508, 93 Am. Dec. 117.)

Right of entry by the guardian of Samuel Chandler and John E. Chandler, adult spendthrifts, to recover land conveyed by the wards while minors for the consideration of $100. It appeared that the consideration paid to John E. Chandler had never been repaid or tendered to the grantee, now the tenant. A verdict was taken for the tenant and John E. Chandler by his guardian alleged exceptions.

WELLS, J.[87] * * * Another ground relied on by the defendant is that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that this right is maintained. Gibson v. Soper, 6 Gray, 279–282, 66 Am. Dec. 414; Boody v. McKenney, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589. Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden v. Boyden, 9 Metc. 519; Robbins v. Eaton, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in one case as in the other. Dana v. Stearns, 3 Cush. 372–376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in statu quo. Tucker v. Moreland, 10 Pet. 65–74, 9 L. Ed. 345; Shaw v. Boyd, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368.

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[86] Accord: Braucht v. Graves-May Co., 92 Minn. 116, 99 N. W. 417 (1904).

In International Text-Book Co. v. Doran, 80 Conn. 307, 68 Atl. 255, (1907), the rule as to the burden of proof is contra—the infant having the burden of showing the contract unfair.

In New Hampshire, where Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209, ante, p. 117, note (1879), is law, it follows that the infant can recover the consideration, subject always to deductions for what he has actually received. Heath v. Stevens, 48 N. H. 251 (1869).

[87] Statement abridged, and part of opinion omitted.

Upon the case as stated in the exceptions we are of opinion that the attempt of John E. Chandler to ratify his deed was ineffectual, and that it may be avoided now by his guardian without the previous return, or the offer to return, the consideration paid therefor. The ruling of the superior court appears to have been otherwise, and therefore these exceptions must be sustained. * * * [88]

GILLIS v. GOODWIN.

(Supreme Judicial Court of Massachusetts, 1901. 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265.)

Morton, J. This is an action by a minor, by his next friend, to recover certain sums paid by him under a contract for the conditional sale and purchase of a bicycle. The plaintiff failed to perform the contract and the defendant took possession of the bicycle, as he had a right to do under the contract, and now has it. The plaintiff demanded the amount which he had paid, and the defendant refused to pay over the same. There was evidence that the amount paid by the plaintiff would not be an unreasonable sum for the rent and use of the bicycle during the time that the plaintiff had the possession and use of it. The defendant asked the judge to rule that the plaintiff could not avoid his contract, and further asked the judge to find for the defendant. The judge refused both requests, and found for the plaintiff, and the case is here on the defendant's exceptions.

Whatever may be the law elsewhere (see Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703), it is settled in this state that a minor can avoid a contract like that in this case, and is not obliged to put the other party in statu quo or allow anything for the rent and use of the property while in his possession. Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; McCarthy v. Henderson, 138 Mass. 310; Dubé v. Beaudry, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am.

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[88] See, also, White v. New Bedford Cotton-Waste Corp., 178 Mass. 20, 59 N. E. 642 (1901), exchange of stock; Miles v. Lingerman, 24 Ind. 385 (1865), sale of land. Compare however, Breed v. Judd, 1 Gray (Mass.) 455 (1854); Bartlett v. Cowles, 15 Gray (Mass.) 445 (1860).

St. Rep. 228; Walsh v. Young, 110 Mass. 396; Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Dec. 117.

The judge must have found that the bicycle and its use did not come under the head of necessaries, and such a finding was plainly warranted as matter of law.

Exceptions overruled.[89]

BAILEY v. BARNBERGER.

(Court of Appeals of Kentucky, 1850. 11 B. Mon. 113.)

Judge Graham delivered the opinion of the Court.

The plaintiff had obtained from the proper department a warrant for one hundred and sixty acres of land, for his services in the United States Army in the late war with Mexico. The defendant being in possession of this warrant, the plaintiff instituted this action of trover to recover its value. The proof in the case shows that on the 14th September, 1849, the plaintiff and Wigginton visited the defendant's store and proposed to sell the warrant to the defendant, who after some chaffering as to its value bought it. He paid the plaintiff $20 in cash, and the plaintiff and Wigginton selected out of defendant's store $100 worth of goods at fair prices. The goods were taken by Wigginton who gave his note to plaintiff for the one hundred dollars, and (as plaintiff stated to a witness) was to give his note with security for the money. He gave his note without security, and shortly afterward failed. At the time of this transaction, and at the commencement of this action, the plaintiff was past twenty but not quite twenty-one years of age, but had the appearance of being a man of mature age. He had for some time before the sale of his warrant been permitted by his father to work for himself and receive the pay. His father states that he had forbidden him to sell his land warrant. Upon demand made by one—as the agent plaintiff, the defendant said he would deliver the warrant on condition of being repaid the amount which he had paid for it. This was not done, and this action was brought on the 23d October, 1849. The jury under the instructions of the Court rendered a verdict for defendant, the Court gave judgment and refused a new trial. From this judgment the plaintiff has appealed.

The first question to be decided, is whether the plaintiff can maintain his suit before he arrives to the age of twenty-one years. The contract is not void, but is only voidable.

Without stopping to cite the various authorities upon this subject, we content ourselves by saying that it is now the well settled doctrine that an infant as to his executed and voidable contracts for personal property may during his infancy exercise the power of rescission. We are next to inquire whether he can avoid his contract without returning or offering to return the money received by him, and the goods delivered to Wigginton, or if not the latter, then the note executed to him by Wigginton, or some equivalent therefor.

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[89] Accord: Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (1903), infant recovered life insurance premiums without deductions; Prudential Life Ins. Co. v. Fuller, 9 Ohio Cir. Ct. R. 415, infant recovered life insurance premiums without deductions; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678 (1878).

It is laid down as good law by Kent, and has so been decided by several Courts of high authority, that if an infant avoids an executed contract, he must restore the consideration which he had received; that the privilege of infancy is to be used as a shield, and not as a sword, and he can not have the benefit on his side of the contract without returning the equivalent on the other. 2 Kent, 240; Roof v. Stafford, 7 Cow. (N. Y.) 182; McPherson on Infants, 488; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. This rule we think is founded on strict impartial justice, and is the law of this case. Infancy may and should protect, but should not be permitted to oppress or injure others. The infant as the adult should be required to act justly. No doubt if one should take any advantage of an infant, or should overreach or defraud him, he would be so guilty of wrong himself that he could not demand a restoration of the consideration received by the infant, before the latter could avoid his contract. Nor would we say that an infant of tender years, or one whose appearance indicates clearly that he is not twenty-one years of age, is embraced within the rule; all we intend to say is, that as is the fact in this case (where the plaintiff lacked but a few months of being twenty-one years of age), when a party not guilty of the slightest fraud, deceit, or imposition, has given a full and fair market value, for the property bought, and where he had from the personal appearance of Bailey, and from the fact that he had previously been acting for himself, working and receiving pay for his work, with the knowledge of, and without let or hindrance from his father, and when he had good reason to suppose him to be a man of mature age, the plaintiff should not be permitted to recover the property or its value, without restoring the price or a fair equivalent therefor.

The cases referred to by plaintiff's counsel as sustaining the position he contends for, have been examined and are found not to be at all in conflict with the opinions herein expressed. We deem it unnecessary to cite them or comment upon them. It will of course be understood that we do not apply this doctrine to defenses by an infant, but only to the case where he is plaintiff, attempting to repudiate an executed contract.

The instructions given by the Court to the jury were not inconsistent with this opinion. We do not perceive any error in the judgment of the Circuit Court. It is therefore affirmed.[90]

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[90] Observe that in Napier v. Chappell, 62 S. W. 21, 22 Ky. Law Rep. 1904 (1901), it was held that a contract for the sale of land made by an infant

CARPENTER v. CARPENTER.

(Supreme Court of Judicature of Indiana, 1873. 45 Ind. 142.)

Worden, J. This was an action by the appellant against Peter G. Boor. There was judgment below for the defendant. Since the appeal, the death of Boor has been suggested, and Jacob A. Carpenter, his administrator, has been made a party hereto as appellee.

The complaint consisted of two paragraphs, the first being general, for the value of a horse sold and delivered; and the second alleged that the plaintiff was an infant under the age of twenty-one years; that in August, 1868, he was the owner of a gelt horse of the value of one hundred and fifty dollars, which he then, at the solicitation of the defendant, traded to the latter for a stallion, and that he delivered the gelding to the defendant, who delivered to him the stallion; that on December ——, 1868, the defendant sold the gelding and parted with his possession; that on the 11th of December, 1868, the plaintiff tendered the stallion back to the defendant and offered to give him up, at the mill and residence of the defendant, and demanded from the defendant the redelivery of the gelding to him, the plaintiff; and the plaintiff then and there informed the defendant that he was under the age of twenty-one years, and that he sought to rescind and avoid the contract aforesaid; and the plaintiff then and there offered to place the stallion in the defendant's stable, but the defendant wholly refused to receive him in any way whatever, and forbade the plaintiff to leave him at the stable; that the plaintiff could not turn the stallion out upon the commons at or near the residence and stable of the defendant, because of the dangerous character of the animal; wherefore the plaintiff took him home and kept him, etc.; that the plaintiff has been at all times, and still is, ready and willing to deliver the stallion to the defendant, and desires to avoid the contract because of his nonage; and he demands judgment for two hundred dollars.

To this paragraph the defendant answered, among other things, as follows:

"And for sixth and further answer," etc., "says that it is true that plaintiff and defendant did exchange horses as is charged in said second paragraph in said complaint, but he says that the said exchange was made at the instance and request of plaintiff, and that for the purpose of inducing the defendant to make said exchange, said plaintiff falsely, corruptly, and fraudulently represented to defendant" (that he) "was at the time of said exchange over the age of twenty-one years; that defendant was ignorant of the age of said plaintiff, and relied upon the said false and fraudulent statements as true, and fully

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may be disaffirmed by him upon his arriving at age without refunding the purchase money received. See, also, Ison v. Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. Law Rep. 366 (1903), ante, p. 212.

believed them to be true, and by the said statements was induced to make said exchange; that at the time of said exchange, the said horse by defendant exchanged to plaintiff was of the value of two hundred dollars, and greatly exceeded in value the horse by plaintiff exchanged to defendant; that before the defendant had any knowledge that" (the plaintiff) "was an infant under the age of twenty-one years, and before any demand by plaintiff for a rescission of said contract, said defendant sold the horse so exchanged to him by the plaintiff, and the same was, at the time of the said demand by plaintiff, entirely out of the control of the defendant, of which fact the plaintiff had full knowledge, and knew that it was out of the power of the defendant to rescind said contract; and said defendant further says that the plaintiff, after the said exchange of horses as aforesaid, and before said demand to rescind said contract, as in said second paragraph of complaint set forth, purposely and intentionally, and with the intent to greatly injure and totally to destroy and diminish the value of the said horse so by him procured of the said defendant, did starve, overwork, beat, cut, bruise, and wound, cripple, founder, and strain the said horse, so that by reason of the said injuries so committed, caused, and inflicted upon said horse by plaintiff, said horse was and is rendered wholly valueless; and defendant prays judgment."

A demurrer for want of a statement of sufficient facts was filed to this paragraph of the answer by the plaintiff, but it was overruled, and an exception was taken.

On issue joined, there was a trial by jury, resulting in a verdict and judgment for the defendant, a motion for a new trial on behalf of the plaintiff having been made and overruled, and exception taken.

The court gave to the jury the following instruction, to which the plaintiff excepted:

"Where a minor and an adult exchange property, and the adult acts in good faith and deals fairly with the minor in all respects, then the minor, if still in the possession of the property received of the adult, before he can recover of the adult the property the adult received of him, or its value, must return or offer to return the property received by him in as good condition as it was at the time he received the same, the unavoidable and natural decay and depreciation of the same excepted."

The correctness of this instruction and of the ruling upon the demurrer to the paragraph of the answer set out are questioned by the assignment of error.

The paragraph of the answer set out was bad, and the demurrer should have been sustained.

The contracts of infants, except those for necessaries, are void or voidable; and those in relation to personal property may be avoided by him during his minority. The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. 1 Parsons, Con. 317; 2 Kent, Com. (12th Ed.) 241. See, also, as to representations made by infants and married women, Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524. With regard to the injury done by the plaintiff to the stallion, as alleged in the pleading, it can have no influence in the case, unless the plaintiff, before he could maintain his action, was bound to tender the animal to the defendant, in as good condition as he received him, unavoidable and natural decay and depreciation excepted, as charged by the court. But we have concluded, upon looking into the question, that the plaintiff was not bound to make any tender of the stallion at all before he could maintain his action. Upon the avoidance of the contract by the plaintiff, the case stood as if none had been made, and his right to the possession of his gelding or the value of him became at once complete and perfect. Upon the avoidance of the contract, the plaintiff still having the stallion, the defendant became without doubt entitled to him, whatever condition he might be in, but it does not follow that the plaintiff was bound to make a tender of him before bringing his action. If the stallion received injury while in the possession of the plaintiff, the remedy of the defendant therefor, if the law furnishes any remedy, is an action for the tort. Says Mr. Parsons: "If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it subsequently to his disaffirmance, the seller, as we have said, may be remediless; unless, possibly, he does it in such a way, or under such circumstances, as to amount to a tort; but if he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract." 1 Parsons, Con. 321.

There can be no difference in principle between this case, so far as the obligation of the plaintiff to make a tender is concerned, and the case of the sale of land by an infant. In such case, it has been held several times in this State, that after coming of age he may disaffirm the contract, and recover the land without tendering back the purchase-money.[91] Pitcher v. Laycock, 7 Ind. 398; Miles v. Lingerman, 24 Ind. 385. See, also, Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503.

[Here the court quoted extensively from the case of Chandler v. Simmons, 97 Mass. 508–514, 93 Am. Dec. 117.]

For these reasons, we are of opinion that the demurrer to the sixth paragraph of the answer should have been sustained, and that the instruction given was erroneous.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

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[91] Accord: White v. Branch, 51 Ind. 210 (1875), exchange; Grace v. Hale, 2 Humph. (Tenn.) 28, 36 Am. Dec. 296 (1840), exchange.

LANE v. DAYTON COAL & IRON CO

(Supreme Court of Tennessee, 1899. 101 Tenn. 581, 48 S. W. 1094.)

Action by Eva Lane, by her next friend, against the Dayton Coal & Iron Company, Limited. Judgment for defendant, and plaintiff appeals.

SNODGRASS, C. J. This is a suit at law by an infant for damages alleged to have been sustained by the negligent killing of her husband. Defendant's eighth plea was accord and satisfaction—that it had paid plaintiff $150 in cash and other consideration, aggregating $200, in full satisfaction of her claim, before the institution of this suit. The plaintiff demurred to this plea on the ground that the declaration showed that plaintiff was, and still is, an infant, and hence was not bound by such an executed contract, and was not bound to refund, or tender with the plea, the consideration received; but she averred a willingness to let the amount received go as a credit on the judgment now sought, if one is obtained. The Circuit Judge overruled the demurrer, and, plaintiff declining to plead further by way of replication, or pay or tender the consideration received, final judgment was rendered for defendant, and plaintiff appealed in error.

Here it is assumed, in argument, that plaintiff may, as a minor, and before attaining majority, repudiate an executed contract of this character, and then insisted that she may do so without refunding or tendering the consideration received, and that this is especially true where the controversy is not in equity, but at law, as in this case; and, further, that if an infant sues for rescission or in any form of pleading attempts to rescind an executed contract of her own, made during minority, she is not bound to restore the consideration received if it has been squandered or is not on hand at the time of the repudiation of the contract, and in support of these positions several authorities are cited.

How this last proposition is, and whether it could have recognition as law in this State, we need not decide. There was no replication to the plea, averring that any part of the consideration had been squandered or was not on hand when the suit was brought or plea filed, and no defense except by demurrer, relying on the declaration—averred infancy of plaintiff. The plaintiff expressly declined to plead further, though ordered to do so by the Court.

As to the other proposition, that the plaintiff might repudiate an executed contract, either in a court of law or equity, without refunding or tendering the consideration received, plaintiff is in error. In a case like the present, where the contract, if between persons of full age, would have been valid, and, as to an infant contractor, would, at most, have been merely voidable—nothing else appearing—there could be no repudiation without repayment or tender of consideration received. On this question, as precisely stated, there is no distinction in the rule applied, whether in a court of law or equity, and whether its application is made to an effort to rescind during infancy or after majority. We have a case holding that, where an infant, by bill in equity, sought relief against a void contract of its ancestor in reference to real estate, no tender of the amount received by the ancestor was essential, but the property, being, of course, always in actual existence, may be charged, on final decree, with the consideration, and repayment or tender in advance excused. Wiley v. Heidell, 12 Heisk. 99. But that case, and those like it, are not authority here, because that was not one where the infant received the consideration, but where the ancestor received it, and on a void sale of real estate.

In the case before us it is obvious, even if it were one of equity cognizance and brought in equity, that such relief could not be assumed as proper or appropriate, because there may never be anything due plaintiff on the original claim and no property or recovery, therefore, on which a lien could be declared. Whether, in this State, a minor, through a next friend, can repudiate at all a merely voidable executed contract as to personalty, or must wait until after his or her majority, we need not determine. It has been decided that a minor cannot thus repudiate such a contract as to realty. McGan v. Marshall, 7 Humph. 121; Scott v. Buchanan, 11 Humph. 468; Swafford v. Ferguson, 3 Lea, 294, 31 Am. Rep. 639; Hook v. Donaldson, 9 Lea, 56; 10 Am. & Eng. Enc. Law (1st Ed.) p. 643, and note.

In some jurisdictions it is held that a different rule prevails as to personalty. Many authorities are collected on this point in 10 Am. & Eng. Enc. Law (1st Ed.) pp. 637, 643, and notes. In second note of last page, a Tennessee case is cited, on affirmative proposition that the infant can before majority repudiate an executed contract as to personalty. Grace v. Hale, 2 Humph. 27, 36 Am. Dec. 296. But the case is not authority for the proposition. It was, in fact, allowed there, but no question as to the right to repudiate was made. It seems to have been conceded by the parties, and other questions presented for decision. But whether or not there be a distinction in this State as to merely voidable contracts in respect to personalty and realty, as to time of repudiation and as to return of consideration, there is no sound rule enforced anywhere in which this plaintiff in the state of the pleadings in this case is entitled to recover or to reverse the action of the Circuit Judge by a showing of affirmative error.

Without regard to manner or time of her effort to repudiate, there is lacking such essential act and pleading as would give title to relief, under such general rule, as might be applied amid the diversity of judicial opinion on the several questions, or phases of the question, presented. Such a general rule is well stated in the editor's first note to the case of Englebert v. Troxell (Neb.) 26 L. R. A. 177 (s. c. 58 N. W. 852), as follows: "The rule which comes the nearest to being general is, that all consideration which remains in the infant's possession upon his reaching majority, or at the time of an attempted disaffirmance in case he is still under age, must be returned, but that disaffirmance will not be defeated by inability to return what he has parted with prior to such time. He will not be permitted to regain what he parted with, or refuse payment while still possessed of what he received. There have been many distinctions attempted between executory and executed contracts, and between seeking relief at law and in equity, but, with only a few exceptions, the rule as stated above has governed the decision, regardless of the facts relied on as distinguishing facts. There is no substantial ground for a distinction as to the rule to be applied, although there may be as to the manner of its application."

On the merits, as to refunding or tendering, with some distinctions as to time and special facts, the Tennessee cases, so far as they go, rightly understood, are in accord. Smith v. Evans, 5 Humph. 70; Parker v. Elder, 11 Humph. 546; Nichol v. Steger, 6 Lea, 396. The rule is the same in case of married women and lunatics. Pilcher v. Smith, 2 Head, 208; Hilton v. Duncan, 1 Cold. 321; Wright v. Dufield, 2 Baxt. 222; Aiken v. Suttle, 4 Lea, 120; Bradshaw v. Van Valkenburg, 97 Tenn. 323, 37 S. W. 88.

We conclude there is no error in the judgment of the Circuit Court, and it is affirmed with costs.[92]

EUREKA CO. v. EDWARDS.

(Supreme Court of Alabama, 1881. 71 Ala. 248, 46 Am. Rep. 314.)

Bill in equity by Eureka Company to set aside a deed of June 12th, 1869, executed by Joseph C. Burgin and Ann Judson, both minors, to Giles Edwards. The facts alleged and proved were that the consideration paid for the conveyance was $1100, of which Joseph C. and Ann Judson received $200, and each had used and expended this money before they reached twenty-one. Upon attaining their majority the said Joseph C. and Ann disaffirmed their deed to Edwards and conveyed to others, from whom the title came to the complainant, the Eureka Company.

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[92] Contra: Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788 (1904); St. Louis, etc., Ry. v. Higgins, 44 Ark. 293 (1884).

In Kilgore v. Jordan, 17 Tex. 342 (1856), the court seemed to take the position that even where the infant was attempting to disaffirm and recover real estate sold by him, there must be a tender of the consideration received before an action of ejectment would lie. More recently in Bullock v. Sprowls, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849 (1899), it was held that a minor who disaffirmed his deed on arriving at his majority was not obliged to restore the consideration, where with the proceeds he bought an interest in a mercantile business, which he afterwards sold, and then dissipated the proceeds.

Note on Whether the Late Infant's Grantee must Make the Same Tender as the Infant must have Done before He can Recover from the One to Whom the Infant Conveyed During Infancy.—See Kilgore v. Jordan, 17 Tex. 342, 355 (1856); Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 344, 76 Am. Dec. 209 (1859).

On the hearing had on pleadings and proof the Chancellor entered a decree denying relief to the complainant and granting an injunction prayed by Giles Edwards in his cross bill, that the complainant be perpetually enjoined from setting up any claim to the premises in question. This decree is assigned as error.

STONE, J.[93] [The Court, after summing up the facts, proceeded thus:] It is thus shown that the appellant—complainant below—stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or any one asserting claim in his right must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. Roof v. Stafford, 7 Cow. (N. Y.) 179; Hillyer v. Bennett, 3 Edw. Ch. (N. Y.) 222; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428; Smith v. Evans, 5 Humph. (Tenn.) 70; Mustard v. Wohlford, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Grat. (Va.) 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still in esse, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Walsh v. Young, 110 Mass. 396; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Dill v. Bowen, 54 Ind. 204; Phillips v. Green, 5 T. B. Mon. (Ky.) 344; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

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[93] Statement abridged and part of opinion omitted.

We have examined Martin v. Martin, 35 Ala. 560, and think the first principle stated in the opinion is not supported by the authorities cited, or by principle.

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.[94]

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[94] Accord: Pitcher and Others v. Laycock and Others, 7 Ind. 398 (1856); Reynolds v. McCurry, 100 Ill. 356 (1881); Bedinger v. Wharton, 27 Grat. (Va.) 857 (1876); Stull v. Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741 (1888).

NOTE ON THE POSITION OF THE BONA FIDE PURCHASER FROM THE INFANT'S VENDEE.—Where, after the infant has sold to an adult and the latter has sold to a bona fide purchaser, the infant wishes to disaffirm and revest the title in himself, he may do so. Harvey v. Briggs, 68 Miss. 60, 80 South. 274,

DEROCHER v. CONTINENTAL MILLS.

(Supreme Judicial Court of Maine, 1870. 58 Me. 217, 4 Am. Rep. 286.)

On exceptions.

Assumpsit upon an account annexed for 25½ days' work, at $1.25 =$31.87, ending June 29, 1869.

The case was referred to the presiding judge, with the right of alleging exceptions.

The judge found, as matter of fact:

That the defendants are a corporation and operators of a large cotton mill in Lewiston; that the plaintiff is a minor, and that she was emancipated by her father before the services for which this suit is brought were rendered; that when she commenced work for the defendants, she entered into a contract to work for them six months, at least, and give no less than two weeks' notice before leaving, failing in which she was to forfeit the wages due; that after working a portion of the time agreed upon, she left without giving any notice; that the loss resulting to the defendants, in consequence of the plaintiff's leaving without notice, exceeded the amount of her wages then due.

Upon these facts the presiding judge ordered judgment for the defendants; whereupon the plaintiff alleged exceptions.

WALTON, J. The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor.

We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated, it, he must pay the damage. Such a doctrine cannot be maintained.

10 L. R. A. 62 (1890); Brantley v. Wolf, 60 Miss. 420 (1882); Hill v. Anderson, 5 Smedes & M. (Miss.) 216 (1845); Downing v. Stone, 47 Mo. App. 144 (1891). If the infant, before he can disaffirm, must tender the consideration which he received, who does he tender it to—the original party contracting with him, or the purchaser? In Downing v. Stone, 47 Mo. App. 144 (1891), he tendered to the first purchaser from him, and this was held to be sufficient.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done when judges undertake to generalize too much, and to decide more than is presented by the cases then before them.

In a case before the House of Lords on appeal, one of the questions was, whether an infant could, by contract, bar her dower. Lord Mansfield, in delivering his opinion, is reported to have said, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." Buckingham v. Drury, 2 Eden, 60.

Relying upon this dictum, it was afterwards held in England that money advanced by an infant for a lease of real estate, which he afterwards avoided, could not be recovered back. Holmes v. Blagg, 8 Taunt. 508.

Relying upon the same dictum, and the above decision, it was afterwards held in New York, that where an infant does work in part performance of a contract, which he fails to complete, he cannot recover for it. McCoy v. Huffman, 8 Cow. 84.

Similar decisions were made in Indiana and New Hampshire. Harney v. Owen, 4 Blackf. 337, 30 Am. Dec. 662; Weeks v. Leighton, 5 N. H. 343.

But these decisions, and the dictum of Lord Mansfield (so clearly erroneous, that one is almost led to doubt whether he could ever have made it), have all been overruled.

In England, the dictum of Lord Mansfield, and the use made of it in Holmes v. Blagg, 8 Taunt. 508, were repudiated in Corpe v. Overton, 10 Bing. 252. In the latter case, the court held that money paid by an infant toward the purchase of a share in the defendants' business, could be recovered back.

In New York, the decision in 8 Cow. was overruled in 7 Hill, 110 (Medbury v. Watrous). In the latter case, it was held that where an infant enters into a contract for the purchase of property, and performs work in part-payment of the price, but avoids the contract on arriving at full age, he may recover for the work.

In Indiana, the decision in 4 Blackf. 337, was overruled in Dallas v. Hollingsworth, 3 Ind. 537.

In New Hampshire, the decision in 5 N. H. 343, was overruled in Lufkin v. Mayall, 25 N. H. 82. In the latter case, it was held that an infant, who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it.

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the court inserted one of those unfortunate dicta, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." "It seems," therefore, says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The court just lay down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it. Moses v. Stevens, 2 Pick. (Mass.) 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated ab initio, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted. Vent v. Osgood, 19 Pick. 572.

And in New York the qualification attempted (inadvertently we have no doubt) to be engrafted upon the rule applicable to such cases, was expressly overruled. The court said they could not yield their assent to the soundness of such a qualification; and the court held, that an infant plaintiff in such an action is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. Whitmarsh v. Hall, 3 Denio, 375.

The dictum of Lord Mansfield, in Buckingham v. Drury, 2 Eden, 60, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again;" and the remark in the opinion of the court in Moses v. Stevens, 2 Pick. (Mass.) 332, that "the jury would make an allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract," are undoubtedly the cause of most, if not all, of the confusion to be found in the books on this branch of the law.

We think the rule of law, applicable to this class of cases, is correctly stated in Vent v. Osgood, 19 Pick. (Mass.) 572; and in the opinion of this court in Robinson v. Weeks, 56 Me. 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and determined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly, no such result could have been reached.

Exceptions sustained.

New trial granted.[95]

Appleton, C. J., and Kent, Barrows, and Danforth, JJ., concurred. Cutting, J., did not concur. Tapley, J., concurred in sustaining the exceptions.

VI. Who, Other than the Infant, may Take Advantage of the Infant's Right to Disaffirm and Recover the Consideration.

HARVEY v. BRIGGS.

(Supreme Court of Mississippi, 1890. 68 Miss. 60, 8 South. 274, 10 L. R. A. 62.)

Woods, C. J. [Only that part of the opinion is given which relates to one point, as follows:]

In discussing the effect of the conveyance of the minors, Dora and Ella Briggs, and the attempted disaffirmance, by the plaintiff, of their contract [they having died during their minority], it is asserted that the right to disaffirm is one personal to the minor, reliance being put upon a remark to that effect, on a petition for reargument, in the case of Alsworth v. Cordtz et al., in 31 Miss. 32. The remark was perfectly correct, as applied to the facts of that case, in which a stranger to the minor, one not the heir or legal representative, attempted to assert this privilege of the minor for his, the stranger's, own benefit. Very properly the court denied the stranger the privilege. But it is not to be supposed that, by the remark of the court that infancy is a personal privilege, and not to be set up by the stranger attempting to plead it in that case, it was ever designed to overturn the universally recognized right of the legal representative or heir of the infant to assert this privilege of pleading infancy. The counsel have taken the remark with too much literalness; and the position that no one but the infant can set up the privilege of minority to defeat his adversary cannot be maintained. The legal representative or heir of the infant is entitled to plead minority in avoidance of the infant's contracts, if the plea be made in good time. Here, in this case, Dora and Ella Briggs were minors when they executed the deed to Harvey, and they both died during infancy. Their sole heir, on arriving at his majority, promptly disaffirms their contract and seeks to avoid it; and this he has clearly the right to do. It is useless to dwell on this point, or to refer to authority.[96]

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[95] Accord: Danville v. Amoskeag Mfg. Co., 62 N. H. 133 (1882); Shurtleff v. Millard, 12 R. I. 272, 34 Am. Rep. 640 (1879), infant repudiated purchase of chattel and sought to recover price paid. Contra: Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690 (1839); Hoxie v. Lincoln, 25 Vt. 206 (1853); Lowe v. Sinklear, 27 Mo. 308 (1858); Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229 (1840).

BOZEMAN et al. v. BROWNING

(Supreme Court of Arkansas, 1876. 31 Ark. 364.)

Joseph A. Browning, a minor twenty years of age, sold the land in question to David M. Browning, an older brother, February 5th, 1839, and gave a bond to convey. The minor received the full price of $2500 for the land. Joseph A. Browning became of age September 1st, 1839, and died September 15th, 1839, after making a will dated September 10th, 1839. By this will he in general terms bequeathed all his property, both real and personal (after payment of his debts) to his father John Browning during his natural life, and after his death, to his mother Nancy Browning, and at the death of both, to be equally divided between his brothers and sisters of the whole blood. John Browning died May 3d, 1844, and his wife Nancy died July 3d, 1868. On January 12th, 1870, this bill was filed in chancery by devisees in remainder under the will of Joseph A. Browning against persons claiming under David M. Browning. The bill prayed that the lands be decreed to be the property of the plaintiffs and others as devisees in remainder under the will of Joseph A. Browning. The case was heard upon the pleadings and evidence and the bill was dismissed for want of equity. The plaintiffs appealed.

English, C. J.[97] * * * Appellants further alleged in the bill, that, if mistaken in the averment that the bond for title was a fabrication, etc., Joseph A. Browning was an infant, under the age of twenty-one years, when he executed the bond, and that the Orphans' Court of Talledega County, Alabama, was without jurisdiction to decree specific performance, etc.

The answers admit that Joseph A. was under age when he made the bond. It appears that he lived about twenty-five days after he was of age.

The bond for title was not void, because of the infancy of the obligor. Modern decisions have established the rule, that an infant's contracts are none of them absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. Vaughan, Adm'r, v. Parr, 20 Ark. 608.

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[96] Accord: Linville v. Greer, 165 Mo. 380, 65 S. W. 579 (1901); O'Rourke v. Hall, 38 App. Div. 534, 56 N. Y. Supp. 471 (1899).

As to the time within which the heir must disaffirm, see Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411 (1885); Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 (1874), ante, p. 208.

[97] Statement of facts abridged from opinion of the court and part of opinion omitted.

The sale of the lands seems not to have been improvident. It was made in accordance with the wishes, and with the approbation of the father, and it is not shown that the price paid for the lands was not a fair one.

As a general rule, no one but the infant himself, or his legal representatives, executors and administrators, can avoid the voidable acts, deeds and contracts of an infant, for while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit; and, when dead, they alone should interfere who legally represent him. Gullett and Wife v. Lamberton, 6 Ark. 118; 1 Parsons on Contracts, 329; Tyler on Inf. and Cov. 59.

It does not appear that the contract in question was disaffirmed by the infant, after he was of age. There is no inconsistency between his will and the bond for title. The will makes no reference to the Arkansas lands, described in the title bond. The devisor devised, in general terms, his real and his personal property. It is shown that he owned both real and personal property in Alabama, at the time he made his will; and there is some evidence that he expressed a desire, during his last illness, to make a deed to his brother, David M., for the Arkansas lands, which he had sold and contracted to convey to him, but was restrained by his physician, who advised him to be quiet, and not to be disturbed with business transactions, which might prove detrimental to him.

Had he expressly devised the Arkansas lands, it would, perhaps, have been a disaffirmance of the previous contract of sale, made while he was an infant. Hoyle v. Stowe, 19 N. C. 322; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 249, 19 Am. Dec. 71.

The administrator of Joseph A. did not, certainly, disaffirm the contract; on the contrary, so far as he could, he affirmed it. He submitted, without objection, to the jurisdiction and order of the Orphans' Court, directing him to make a deed to David M. Browning, in accordance with the bond for title. He executed the deed, brought it to Arkansas, and delivered it to David M. Browning, who was then in possession of the lands, under the bond for title. He set up no claim to the lands, during his life time, as devisee under the will. It seems that he sold the Alabama lands to Joseph A., and that the remainder devisees under the will made quit claim deeds to the purchaser. There is some evidence that he brought the negro woman which David M. let Joseph A. have in part payment of the lands, to Clark County, and sold her, and that at some time after his death, so much of Joseph's estate as remained, was distributed to his devisees.

The appellants attempted by their bill, after the lapse of over thirty years, to disaffirm the bond for title, on the ground of Joseph's infancy, and to recover the lands from his vendee, and those holding under him, claiming the lands, as remainder devisees, under general expressions of his will.

The rule seems to be, that the privilege of disaffirming an infant's contract, extends to his legal representatives, after his death, or his privies in blood, entitled to the estate upon avoidance of the contract, but not to his surety, endorser or any strangers, or his assignee, or other privy in estate only. 1 Chitty on Contracts (11th Am. Ed.) p. 222, note (o).

The rule would extend, says Mr. Tyler (Inf. and Cov. p. 59), to privies in blood of the infant, but not to his assignees or privies in estate only.

The appellants in their bill, claim the lands not as the heirs of privies in blood of the infant, but solely as devisees under his will, and they claim to exclude all others, except his brothers and sisters, of the whole blood, and their descendants. In other words, they claim as devisees under the will, as any stranger might do, if a devisee, though not an heir or privy in blood. They place themselves, in their bill, on the ground only of privies in estate.

Had Joseph died intestate, possibly his Arkansas lands might have gone to his father, who furnished the money to purchase them, and on his death, to the heirs of the father generally; but, if the lands were a new acquisition, they would have gone to the father for life, and in remainder to the collateral kindred of Joseph. Gantt's Digest, § 2161; Kelly's Heirs et al. v. McGuire et al., 15 Ark. 555.

David M. Browning paid for the lands, took the bond for title, and went into possession of the lands under it. Had Joseph A. lived, he would have been obliged to disaffirm the contract within the period of limitation, which commenced running at his majority, or his right to disaffirm would have been barred. He certainly could not have maintained this bill, after the lapse of thirty years, to disaffirm the contract, and recover the lands of his vendee, and his grantees; and the statute having commenced running against him during his life time, we do not see that appellants, who claim under his will, are in any better condition than he would have been, had he lived and brought the bill himself. Cresinger v. Lessee of Welch, 15 Ohio, 195, 45 Am. Dec. 565; Hughes v. Watson, 10 Ohio, 134; Drake v. Ramsey, 5 Ohio, 252; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Blankenship et al. v. Stout, 25 Ill. 132; Tyler on Inf. and Cov. 67. Moreover, had Joseph lived, and brought this bill to disaffirm his contract, and recover the lands in apt time, the court would not have granted him the relief prayed, without his paying back to David M. Browning the purchase money which he paid him for the lands.

Yet appellants, who claim the lands under Joseph's will, seek, by their bill, to disaffirm his contract, and recover the lands, and do not tender or offer to refund any part of the purchase money.

It was well said by Chancellor Kent, that the privilege of infancy is to be used as a shield, and not as a sword. 2 Kent, Com. 240; Tyler on Inf. and Cov. 77; Strain v. Wright, 7 Ga. 570; Jeffords, Adm'r, v. Ringgold et al., 6 Ala. 544 (in which it was also held that the executor or administrator of an infant could ratify the contract of an infant, without any new consideration); Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; 1 Parsons on Con. 320; Womack, Adm'r, v. Womack, 8 Tex. 397, 58 Am. Dec. 119; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Weed v. Beebe et al., 21 Vt. 495. * * *

MANSFIELD v. GORDON.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 168, 10 N. E. 773.)

DEVENS, J. The plaintiff is the assignee of the estate of William A. Burrell, an insolvent debtor, and, by this bill in equity, seeks to relieve a parcel of land belonging to the estate from the incumbrance of a mortgage thereon, conditioned for the payment of a promissory note of $1000. The note and mortgage were executed by Burrell when under age. He is now of age, and was so when the insolvency proceedings were begun. Since his majority, he has not ratified the note and mortgage; nor is it alleged that he has done any act in disaffirmance thereof.

The assignment vested in the assignee, not only "all the property of the debtor, real or personal, which he could have lawfully sold, assigned, or conveyed," including debts due him and the securities therefor, but also "all his rights of action for goods or estate, real or personal." Pub. St. c. 157, § 46. "By the 'right of action' mentioned in the statute," it is said by Chief Justice Shaw in Gardner v. Hooper, 3 Gray, 398, 404, "the Legislature intended all valuable rights actually subsisting, whether absolute or conditional, legal or equitable, which were to be obtained by the aid of any species of judicial process."

It is the contention of the plaintiff, that, by virtue of this clause, he, as assignee, is entitled to exercise the privilege which the insolvent might have exercised on reaching his majority, and to disaffirm this mortgage, and thus is entitled to a decree relieving the estate therefrom.

That an individual creditor cannot attach property conveyed by a debtor while a minor, the conveyance of which such debtor might have disaffirmed, and thus avail himself of the infant's privilege, is well settled. McCarty v. Murray, 3 Gray, 578; Kendall v. Lawrence, 22 Pick. 540; Kingman v. Perkins, 105 Mass. 111. While the rights of an assignee are not always tested by those of an individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors. The contracts of an infant are voidable only, and not void; and it has often been said that the right to avoid his contracts is a personal privilege of the infant only, not to be availed of by others. Nightingale v. Withington, 15 Mass. 272, 274, 8 Am. Dec. 101; Chandler v. Simmons, 97 Mass. 508, 511, 93 Am. Dec. 117; 1 Chit. Con. (11th Am. Ed.) 222. It is said by Wilde, J., in Austin v. Charlestown Seminary, 8 Metc. 196, 203, 41 Am. Dec. 497: "Voidable acts by an infant, or matters of record done or suffered by him, can be avoided by none but himself or his privies in blood, and not by privies in estate; and this right of avoidance is not assignable." Bac. Abr. Inf. & Age, I, 6; Whittingham's Case, 8 Rep. 42b, 43a.

It is said that it is for the benefit of the debtor that the assignee should be allowed to avoid his mortgage, as the assets of the estate are thus increased. The ground upon which an infant is allowed to avoid his contract is for his personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received, but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received. The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege, and that, as the rule permitting him thus to avoid his contract is established solely for his protection, so he alone can have the benefit of it.

Decree dismissing the bill affirmed.

RIGGS v. FISK.

(Supreme Court of Judicature of Indiana, 1878. 64 Ind. 100.)

NIBLACK, J. This was an action, by John Riggs, against Samuel E. K. Fisk, for the recovery of the possession of a tract of land lying in Vigo County, estimated to contain ten acres.

The complaint was in the usual form. The defendant answered in general denial.

The cause was submitted to the court for trial, upon an agreed statement of facts, which may be summarized as follows:

Welthy A. Bailey, being a married woman, was, on the 27th day of May, 1871, the owner of the tract of land in controversy; and, on that day, with her husband, Willis R. Bailey, conveyed said land by warranty deed, duly acknowledged and recorded, to one James R. Ernest; that said Ernest paid the purchase-money, and went into possession under said deed, claiming title to the land, and remained in possession until his death; that, since the death of Ernest, the defendant, Fisk, has been in possession of said land as his residuary devisee, and has since remained, and still remains, in possession as such devisee; that, at the time the deed to Ernest was made, Mrs. Bailey was a minor under the age of twenty-one years; that, after arriving at the age of twenty-one years, to wit, on the 3d day of September, 1873, the said Welthy A. Bailey and her said husband executed and delivered to the plaintiff, Riggs, a warranty deed for the land in suit, which deed was also duly acknowledged and recorded; that, on the 4th day of August, 1873, the said Welthy A. Bailey instituted a suit in the Vigo Circuit Court, against the said Ernest, to recover the land sued for in this action, but that said suit was afterward, on the 25th day of October, 1874, dismissed without judgment or prejudice to the rights of either party; that, on the 8th day of May, 1874, the said Welthy A. Bailey and her husband attempted, by quitclaim deed, duly executed and acknowledged, to convey the same land to the said Ernest, but by mistake the land was not properly described in such deed; that the plaintiff has never been in the possession of the land concerning which this suit is prosecuted, but has demanded possession of it before this suit was commenced, both from the said Ernest and the defendant, and was refused such possession by both Ernest and the defendant; that the said Ernest paid to Mrs. Bailey twenty dollars for said quitclaim deed, and that she did not claim to have any title to the land attempted to be conveyed, by such quitclaim deed, when it was executed; that neither Mrs. Bailey nor her husband, nor any one else for either of them, has ever refunded any of the purchase-money paid by the said Ernest, and that the plaintiff paid to Mrs. Bailey the full amount of the purchase-money agreed to be paid by him, none of which has ever been refunded.

Upon these facts, the court found for the defendant, and, after overruling a motion for a new trial, rendered a judgment in his favor, upon the finding.

The only error assigned is upon the overruling of the motion for a new trial.

It has been decided by this court, in the very carefully considered case of Pitcher v. Laycock, 7 Ind. 398, upon what we regard as amply sufficient authority, that an infant's conveyance of land may be disaffirmed, on his attaining his majority, without entry, by conveying the land to another person, and that it is not necessary to return the purchase-money to make such disaffirmance effectual.

In Parsons on Contracts (6th Ed.) vol. 1, p. 328, it is said, and we think correctly, that: "If any act of disaffirmance is necessary to enable an infant after attaining his majority to avoid his conveyance made while a minor, it is now well settled that the execution of a second deed, which is inconsistent with the former deed, is itself a disaffirmance of the former deed, although the infant had not previously manifested any intention to avoid it and had made no entry upon the premises conveyed. The old rule, requiring such entry before the infant could make another conveyance, has long since been done away."

But we are of the opinion, that, to make a second deed, executed as above indicated, effectual for all purposes as a conveyance, the grantor must, at the time of its execution, be either in the actual or constructive possession of the premises conveyed by it.

In Parsons, supra, it is further said, in connection with what is quoted as above, that "in some of our states, however, a sale of lands can be made only by one in possession; and in that case the infant should enter before making his conveyance."

By this, as applicable to cases in this state similar to the one before us, we understand the author to mean, that, where lands conveyed by a minor are in the adverse possession of some one else, whether under his deed or otherwise, when he arrives at full age, he must first obtain, by entry or other proper proceedings, the possession of such lands before he can make a second deed that will be effectual to put the grantee into possession.

Thus construed, we regard the rule lastly as above laid down by Parsons, as being a correct and safe one for us to follow, as applicable to the case at bar.

But, while a second deed, made by a minor after he arrives at full age, will not be operative as against a third person in adverse possession, it is still good between the parties, and as to all the rest of the world, except the person in such adverse possession. 4 Kent, Commentaries, p. 448; Steeple v. Downing, 60 Ind. 478.

While such a deed is void as to third persons in adverse possession, it nevertheless authorizes the grantee to prosecute a suit in the name of the grantor, for the recovery of the premises conveyed for the benefit of the grantee.[98] Steeple v. Downing, supra.

Although such second deed of the late minor may be thus void as to some third person in the adverse possession of the land conveyed, we have come to the conclusion, and accordingly hold, that such a conveyance operates as a disaffirmance of the first deed made during the grantor's minority.

Owing, however, to the adverse possession of Ernest at the time Mrs. Bailey conveyed to the plaintiff, there was no error in the decision of the court below.

The judgment is affirmed, with costs.

VII. PARTICULAR CASES WHERE INFANT'S RIGHT TO DISAFFIRM AND RECOVER THE CONSIDERATION IS MORE RESTRICTED THAN IN GENERAL

(A) Contracts for Services

CLEMENTS v. LONDON & N. W. RY. CO.

(Court of Appeal. L. R. [1894] 2 Q. B. Div. 482.)

See ante, p. 221, for a report of the case.

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[98] See to the same effect the opinion of the court in Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71 (1829), and the application of the same principle to a case where the deed of an insane person was avoided by the second assignment of said insane person after recovery. Compare, however, Riley v. Dillon & Pennell, 148 Ala. 283, 41 South. 768 (1906), post, p. 310.

FELLOWS v. WOOD.

(Supreme Court of Judicature, Queen's Bench Division, 1888. 59 Law T. [N. S.] 513.)

See ante, p. 225, for a report of the case.

WAUGH v. EMERSON.

(Supreme Court of Alabama, 1885. 79 Ala. 295.)

Action by Walker Emerson, a minor, suing by his next friend, against Emiline Waugh, to recover wages due for personal services rendered by him to her.

Plaintiff was without a father, the latter having died several years before. His mother had contracted a second marriage. The plaintiff was about nineteen years old and had no guardian. He was not shown to have had any estate. Commencing in the latter part of 1884 he agreed to serve Mrs. Waugh at an agreed price of $120 for the year, or $10 a month for a year. In October the plaintiff finally left Mrs. Waugh's service. He testified that he was discharged by her without cause. Mrs. Waugh testified that she had advanced to the plaintiff during the year from time to time money, tobacco, articles of clothing, etc., of which she kept an account. She produced this account and the items aggregated $75.60.

The defendant requested the following with other charges to the jury:

"(5) If the jury believe, from the evidence, that the plaintiff is a minor, eighteen or nineteen years of age, and that his father has been dead for several years; then it was his right and duty to work at some legitimate calling or labor, for his support and maintenance, and it was lawful and right for the defendant to hire him; and if she did hire him, and he performed work or labor for her, then it was lawful and right for her to pay him for such work; and if she did then, in good faith, pay him any sum or sums for his labor, then he can not recover in this suit the value of the services or labor thus paid for." The court refused this charge. The defendant excepted and now assigns the refusal as error.[1]

Stone, J. [after stating the case, continued:]

For the plaintiff—appellee here—it was contended in the court below, and the contention is renewed here, that the doctrine of an infant's liabilities for necessary articles furnished him, must be applied to Mrs. Waugh's asserted partial payments made; and that unless such payments and furnishings were in fact necessaries, suitable to his estate and condition in life, then Mrs. Waugh is not entitled to a credit for them. We can not assent to this. The contract to serve was made by Emerson; and though a minor in years, he was in fact and in law emancipated. No one was bound to support him, and no one but himself could claim his wages. He had a clear right to direct and appoint their payment, and no other person could interpose and assert a paramount right to them. The present suit, brought while he was yet a minor, is itself an assertion of his right to collect them. His guardian ad litem would have no right to control the recovery. Will it be contended that the judgment he might recover could not be collected until a legal guardian is appointed to receive it? and if paid to him, or to his guardian ad litem, when the collection is coerced by execution, will the defendant be liable to another recovery, when a legally appointed guardian comes to claim it? Donegan v. Davis, 66 Ala. 362; Glass v. Glass, 76 Ala. 368; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Whiting v. Earle, 3 Pick. 201, 15 Am. Dec. 207; Johnson v. Silsbee, 49 N. H. 543; Isaacs v. Boyd, 5 Port. 388; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; Engelhardt v. Yung, 76 Ala. 534.

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[1] Statement of facts abridged from the opinion of the court and from the statement as made in the report.

Situated as the defendant was, with no one but himself entitled to his earnings, he was entitled to receive compensation for his services, and equally entitled with an adult to receive partial payment while the work progressed. Payments to an infant should, probably, be scrutinized more narrowly, that frauds upon him, either in price or quality, be not sanctioned by the court. Beyond this, and with the exception of overreaching bargains, the right of an emancipated minor to receive compensation for labor performed by him pursuant to his own contract, express or implied, rests on the same principle as that of an adult. The fifth charge asked and refused should have been given. We need not notice the other questions raised.

Reversed and remanded.[2]

[2] Accord: Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152 (1879); Wilhelm v. Hardman, 13 Md. 140 (1859); Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228 (1842); Hagerty v. Nashua Lock Co., 62 N. H. 576 (1883); Myers v. Rehkopf, 30 Ill. App. 209 (1863); Murphy v. Johnson, 45 Iowa, 57 (1875), by statute.

Where an infant has released another from all liability to the infant for a tort committed, and where the infant afterwards disaffirms and seeks to recover upon the original cause of action, it has been held that the amount received by him should be allowed by way of reducing the damages recovered. Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88 (1809); Tipton v. Tipton, 48 N. C. 552 (1854); Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 S. E. 634 (1907). In the last case, however, the defendant was allowed to deduct only so much as the infant had actually used for necessaries, or so much of the consideration received by him as has been used for purposes the Court would sanction as being necessary for him, and so much as may still be in his hands in such form that the Court could control it for his benefit if his majority has not been attained, or, if it has, for so much as the infant elected to retain on reaching his majority.

There can be deductions for unskillful work by the infant. Vehue v. Pinkham, 60 Me. 142 (1871).

(B) Contracts for Necessaries

STONE v. DENNISON.

(Supreme Judicial Court of Massachusetts, 1832. 13 Pick. 1, 23 Am. Dec. 654.)

Assumpsit for work and labor.

At the trial, before Wilde, J., the plaintiff proved that he had been in the service of the defendant from October, 1818, to October, 1828, when he became twenty-one years of age; and he introduced evidence tending to show that his services were worth more than the support and education furnished him by the defendant. Evidence was offered by the defendant tending to show the contrary, and that the agreement was a reasonable one.

The defendant contended that he was not liable, because at the time when the plaintiff was fourteen years of age, his father being dead, George Eels was duly appointed his guardian, and it was agreed between the plaintiff, the defendant and the guardian, that the plaintiff should continue in the service of the defendant, until he should arrive at the age of twenty-one, for his board, clothing and education, and the defendant had performed the contract on his part.

The plaintiff objected to the admission of evidence to prove these allegations.

But the judge admitted the evidence, and instructed the jury, that if the plaintiff entered into this agreement as contended for by the defendant, and entered into the service of the defendant in pursuance of the same, and continued in it during all the time agreed upon, he could not waive the contract and go upon a quantum meruit, unless the contract was obtained by unfair means, and so was fraudulent on the part of the defendant; and that if the contract was so unreasonable as to show that the plaintiff was overreached, that would be evidence of fraud and would render the contract null and void.

The jury found a verdict for the defendant, and the plaintiff moved for a new trial. If the foregoing opinions and instructions were erroneous, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.[3]

SHAW, C. J., delivered the opinion of the Court. Several points were left to the jury in the present case, which may be considered as settled by their verdict.

By the report it appears, that after the plaintiff arrived at the age of fourteen years, having then lived several years with the defendant, it was agreed between the plaintiff and his guardian on the one side, and the defendant on the other, that the plaintiff should continue in the service of the defendant until he should arrive at the age of twenty-one, for his board, clothing and education. By the finding of the jury, under the instructions given to them by the Court, it must be taken to have been settled, that the contract was not obtained by any unfair means, or fraudulent, on the part of the defendant, and that it was not unequal, so as to show that the plaintiff was overreached.

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[3] Statement abridged.

The case then is one of a minor over fourteen years of age, entering into an agreement with a person, for labor and service to be furnished on one side, and subsistence, clothing and education on the other, an agreement in which the minor was not overreached, which was not so unreasonable as to raise any suspicion of fraud, and which was assented to and sanctioned by the guardian of the minor. This agreement is fully executed on both sides; the labor and services are performed by the minor, and the stipulated compensation is furnished by his employer. And the question is, whether the plaintiff, notwithstanding such agreement, can maintain a quantum meruit for his services, merely by showing, that in the event which has happened, his services were worth more than the amount of the stipulated compensation; and we think he cannot.

[Part of opinion relating to another point omitted.]

We do not think it necessary, in the present case, to consider some of the points made in the argument, as to the cases in which the judge of probate has the power, under the statute, to appoint guardians to minors, and as to the authority of such guardians over the persons, property and rights of their wards, because we are all clearly of opinion, that the contract in question was one which the minor, with the consent of the guardian, was himself competent to make.

It is a well settled rule of law, that a minor, under the age of twenty-one years, cannot bind himself generally by his contracts, for want of legal capacity. But as an exception to this general rule, it is equally well settled, that a minor may bind himself by a contract for necessaries, if equal and reasonable, and also that he may make contracts which are beneficial to him. We think the present case brings the contract under the first of these exceptions.

A contract for subsistence, clothing and education, is a contract for necessaries, and is one therefore which the minor has capacity to make, and which, if reasonable and beneficial, will be supported by the law. Most of the cases, where it has been decided that a minor cannot be held on his express contract for necessaries, are those where the action is founded on the express obligation, and where, from the form of the action, the consideration cannot be inquired into. As an action on a bond with a penalty, which implies a consideration, and where an inquiry into the consideration is precluded by the forms of pleading and proof. So on an insimul computassent, where the action is founded upon the act of accounting and the admission of the balance, and no further inquiry into the consideration and terms of the contract can be gone into. These actions are founded on the assumption, that the party has full power to bind himself by any lawful contract, and they only open the question, whether he has so bound himself. But in the other forms of obligation and of action, and where it can always be open to inquiry, what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may as well be bound by an express, as by an implied contract for necessaries. This is often beneficial to the minor, and enables him to avail himself of any stipulations in his favor. If such an express contract should be held to be wholly void, and the party furnishing the minor with necessaries should be remitted to his action on the implied contract, he would recover upon a quantum valebant or quantum meruit, though above the stipulated prices. The rule as above qualified, that a minor shall only be bound by such a species of express contract, and in such a form of action, as leaves the nature, terms and consideration of the contract open to inquiry, and then only by such a contract as shall appear at the time to have been fair, reasonable and beneficial to the minor, affords a sufficient security to the rights of minors.

And it appears to the Court, taking into consideration the age of the minor when the contract was made, and the circumstances attending it, that it was reasonable and beneficial. It is to be considered, that the employer took upon himself the risk of the health, life and bodily and mental capacity of the plaintiff to labor. Had he been sick or otherwise incapable of performing any labor, the defendant was nevertheless, by the terms of his contract, bound to support him. These considerations may have rendered the contract equal and beneficial at the time, although in the event, which could not then be foreseen, the plaintiff's labor may have been of greater value than the subsistence and education which he obtained as an equivalent. The circumstance also, that the contract was made with the consent and approbation of the guardian, evinced by his becoming a party to it, goes strongly to show that the contract was entered into deliberately and with a just regard to the rights and security of the minor. And it would be injurious rather than beneficial to minors, to hold that a contract thus made is of no legal force and effect.

We think the instructions of the Court were correct, and there must be

Judgment on the verdict.[4]

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[4] Accord: Squier v. Hydliff, 9 Mich. 274 (1861); Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662 (1837); Wilhelm v. Hardman, 13 Md. 140 (1859). Observe, however, statements in Van Pelt v. Corwine, 6 Ind. 363 (1855), that Harney v. Owen, supra, has been overruled.

(C) *Partnership Contracts*

SHIRK v. SHULTZ.

(Supreme Court of Judicature of Indiana, 1887. 113 Ind. 571, 15 N. E. 12.)

Zollars, J. Appellant alleges in his complaint that, in October, 1884, when he was a minor, he entered into partnership with appellee for an indefinite time, in the business of upholstering and dealing in furniture, under the firm name of Shirk & Shultz; that he still is a minor; that he invested in the business $500; that the firm has on hand furniture and goods of the value of $850, and is in debt over $600; that "he is advised by his guardian to renounce such partnership and withdraw from said firm, and he hereby renounces such arrangement and asks to avoid, annul and undo all of his obligations in that behalf;" that Shultz is insolvent, and that the firm creditors will exhaust the assets of the firm unless a receiver shall be appointed to take charge of them, etc.

The prayer is for the appointment of a receiver to take charge of the assets of the firm, and convert them into money, and pay, first, to appellant the amount invested by him, and second, the firm debts. The court made a special finding of facts, in substance, that, in October, 1884, Shirk and Shultz entered into partnership and continued in business until the commencement of this action, in August, 1885. Shirk is a minor and has a guardian. He entered into the partnership and put into the business $271.40 with the consent of his guardian. Of that amount $74.50 was paid to Shultz to be used in the purchase of goods for the firm, and it was so used. The balance of the $271.40 was paid by Shirk on the debts of the firm, for goods and labor of employés.

During the existence of the firm, Shirk drew out $100. Shultz put into the business $260 and drew out nothing. The assets of the firm, at the time this suit was commenced, amounted in value to $800, and its debts aggregated $700. Shultz is insolvent.

Upon the facts so found, the court below concluded as a matter of law, that the firm should be dissolved, and that a receiver should be appointed to take charge of the firm assets, convert them into money, and pay, first, the costs of this suit, second, the firm debts, and, third, divide the surplus, if any, between the partners. A receiver was accordingly appointed.

Appellant excepted to the conclusions of law and contended, and still contends, that, upon the facts found by the court, he is entitled to have refunded to him from the assets of the firm the amount which he invested, in preference to the partnership creditors and all others. Whether or not he is so entitled is the one question for decision.

[Here the court states at length the cases of Dunton v. Brown, 31 Mich. 182, Bush v. Linthicum, 59 Md. 344, Kitchen v. Lee, 11 Paige

(N. Y.) 107, 42 Am. Dec. 101, Moley v. Brine, 120 Mass. 324, and other cases, and then continues as follows:]

It will be observed that the decision in the Michigan case, above cited, is based upon the proposition that an infant cannot disaffirm a partnership agreement during his minority. The reasoning in that case was adopted in the Maryland case.

The decision in the case of Kitchen v. Lee, supra, was based largely upon the proposition that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he purchased it.

It may be said of most, if not of all, the propositions upon which the decisions in the cases cited are based, that they have not been regarded as the law in this State. We have stated them for the purpose of determining whether or not the conclusions in those cases may be regarded as correct, notwithstanding the propositions upon which they rest may be regarded as incorrect.

The holdings of this court have been, that all voidable contracts by an infant in relation to personal property may be disaffirmed by him during minority. Carpenter v. Carpenter, 45 Ind. 142; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429, and cases there cited; Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759, and cases there cited; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, and cases there cited, including cases by the Supreme Courts of Vermont, Massachusetts and New York.

In support of the right of infants to disaffirm such contracts during minority, see, also, Tyler, Infancy (2d Ed.) pp. 70 and 72, and cases there cited; Schouler, Domestic Relations, § 409; 1 Lindley, Partnership, star p. 83.

The Supreme Court of Maryland, since the case above cited from that court, has held that an infant may thus disaffirm during minority. Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379. And so it has been the holding of this court that, in order to disaffirm and maintain an action during minority for his property, or for money paid on a voidable contract, it is not necessary for the infant to return what he has received, or to place the other party in statu quo. Pitcher v. Laycock, 7 Ind. 398, and cases there cited; Miles v. Lingerman, 24 Ind. 385; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Towell v. Pence, 47 Ind. 304; Carpenter v. Carpenter, supra; White v. Branch, 51 Ind. 210.

The statute of 1881 has changed the rule as to real estate, but that change is not material here. Section 2945, R. S. 1881.

And so, upon ample authority, this court has repudiated the doctrine that "if an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189, and cases there cited.

The cases thus reviewed lend aid to the proposition that in the case before us appellant can not, through the instrumentality of the court, exercising equitable powers, and the receiver appointed by it, have the assets of the firm appropriated in the way of refunding to him what he invested in the business, and thus leave the firm creditors wholly or partially unpaid. And, so far as they sustain that proposition, we approve of them, although disapproving, in the main, the reasoning upon which they rest.

Had appellant purchased the goods on his own account, and paid for them, he might have disaffirmed the contract and recovered the amount paid, without first returning or offering to return them to the person from whom he purchased them. It does not follow from that, however, that after having thus disaffirmed the contract, he could, nevertheless, hold the goods as against the person from whom the purchase was made. He would not be allowed to retain the goods after having thus recovered what he paid for them.

When an infant thus repudiates a contract, he repudiates it for all purposes. He cannot repudiate it so as to escape payment for an article purchased, and still hold the article as against the person from whom the purchase was made. As was said in the case in Paige, supra, when a contract is thus repudiated, the vendor may have his action to recover the goods from the infant if they remain in his hands unchanged. And so, if appellant had purchased the goods on his own account, he might have disaffirmed the contract and refused to pay for them without returning or offering to return them to the vendor. But after having thus disaffirmed the contract, and refused to pay, he could not hold the goods as against the vendor. See Kitchen v. Lee, supra; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.

What he could not do otherwise, he certainly cannot accomplish through a court of equity. Having gone into court, and asked that the assets of the firm should be taken charge of by it, through a receiver, he must be held to have consented that the court shall deal with them and the rights of all concerned as the law and equity may require. Having thus invoked the interposition of the court, he must be held to have consented that it shall close out the business so as to settle the ultimate rights of the parties. If it be said that his disaffirmance of the contract is such as would otherwise have relieved him from the obligation to pay for the goods, then the court having charge of the goods has the right to see to it that they, or the money that may be realized from the sale of them, shall be returned to the vendor.

In our judgment, however, appellant's course has been such as to ratify the purchase of the goods and all that has been done by the firm. He states in his bill that he "renounces the partnership arrangement, and asks to avoid and annul all of his obligations in that behalf," but, at the same time, he treats the goods and assets on hand as partnership assets, and asks the court to take charge of and deal with them as such. His disaffirmance puts an end to the contract by which he became a member of the firm, but by asking the court to take charge of the goods as assets of the firm, as to them, he not only does not disaffirm, but ratifies all that was done in the purchase of them. As to them, he can not disaffirm and at the same time treat them as partnership assets. Having treated them as assets of the firm by asking the court to deal with them as such, the court will deal with them as partnership assets, as in any other case, and apply them first to the payment of the debts of the firm. 2 Lindley Partnership, star p. 1040.

This is not an action against the other partner to recover a personal judgment against him for the amount paid into the business by appellant. What might be the rights of the parties in such an action we do not decide. It is sufficient here, that, in our judgment, the conclusions of law by the court below, upon the facts found, were correct, and the proper decree was entered.

Judgment affirmed, with costs.

MOLEY v. BRINE.

(Supreme Judicial Court of Massachusetts, 1876. 120 Mass. 324.)

Bill in equity to close up a partnership. At a former hearing, before Wells, J., the plaintiffs relied on an agreement signed by the three partners, of which the following is a copy: "Agreement made this third day of August, A. D. 1871, between J. B. Brine, P. J. Moley, and E. F. Jackson. The partnership heretofore existing under the firm of Brine Bros. & Co. is hereby dissolved. E. F. Jackson is alone authorized to sign the name of the firm in liquidation, make collections, pay bills, receive money, and draw checks, until the old business is settled as hereafter arranged. The other partners shall assist in closing up the business, except as aforesaid. From collections and assets, E. F. Jackson is to receive the sum advanced by him, $4,874, without interest. The balance of assets and property, after paying debts, to be divided between Messrs. Brine and Moley, according to their interest in the business; that is to say, $1,800, without interest, to Moley, and the balance to Brine. Brine takes the store and business. Brine and Moley assume the risk of all accounts and contracts up to August 1, 1871. All money drawn from the business after August 1, 1871, by P. J. Moley and E. F. Jackson is to be deducted from the above portion." Under that agreement Jackson had begun to liquidate the affairs of the firm prior to the filing of this bill.

It was then ordered: (1) That that agreement "be set aside and annulled as an agreement, the said Brine being a minor at that date, and having elected to avoid the same on that ground; and that said writing be taken to have no further or other effect than as evidence upon the question of the actual transactions and relations between the parties." (2) "That the case be referred to a master to hear the parties and report to the court his findings as to the actual relations between the parties and their respective rights in and to the funds and assets that are now in or that may come into the hands of the receiver; and also to state the accounts between them."

The master's report stated the following facts: The partnership was formed about July 1, and was dissolved by mutual consent on August 4, 1871. At the formation of the partnership, Jackson contributed to the common stock $4,874, Moley $1,800, and Brine $882, and it was agreed that each should receive one third of the profits. During the continuance of the partnership, Jackson drew out $34, Moley $100, and Brine $673.15. There were no profits of the partnership, and the assets were not sufficient to pay back in full the original contributions.

At the final hearing, before Colt, J., the plaintiffs contended that, no agreement being shown as to the division of the common stock upon a dissolution of the partnership, each partner was entitled to the amount of his contribution and interest, and that the deficiency in assets should be borne by the partners equally.

The defendant contended: (1) That the assets should be equally divided among the three partners, without regard to the amounts contributed by each. (2) That if such was not the rule, then the deficiency should be borne by the several partners in proportion to the several amounts contributed by them, and that the defendant should not bear any part of the deficiency.

The case was reported for the consideration of the full court; such order or decree to be entered as the case required.

GRAY, C. J. The assets remaining upon the settlement of the business of the partnership, being less than the amount contributed by all the partners to the common stock, must be divided among them according to the amount of their contributions, and the deficiency must be borne by the partners in the same proportions in which they were to bear profits and losses, that is to say, in this case, equally. Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311.

This rule is not affected by the fact that the defendant is an infant. According to the agreement between the parties, he contributed less than one-eighth of the capital stock, and was to receive one-third of the profits of the business. He actually entered into the partnership, had the benefit of it while it lasted, and drew out the greater part of his contribution. The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his copartners the obligation of making up the deficiency. Breed v. Judd, 1 Gray, 455; Holmes v. Blogg, 2

Moore, 552, s. c. 8 Taunt. 508; Ex parte Taylor, 8 De Gex, M. & G. 254; Aldrich v. Abrahams, Hill & D. Supp. 423, 425; Medbury v. Watrous, 7 Hill, 110, 112, 113; Heath v. Stevens, 48 N. H. 251.

Decree for the plaintiffs accordingly.[5]

(D) Acts of Infant's Counsel in the Course of Litigation[6]

BELIVEAU v. AMOSKEAG MFG. CO.

(Supreme Court of New Hampshire, 1895. 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577.)

Action by Edourdina Beliveau, by next friend, against Amoskeag Manufacturing Company. On motion by the plaintiff to strike off the docket entry "Judgment for the plaintiff by agreement. Judgment satisfied,"—made in accordance with a written agreement entered into by the attorneys of the parties, entitled as of the term, and filed with the clerk while the court was in session, as follows: "It is agreed that judgment in this case be entered for the plaintiff in the sum of one thousand dollars and costs, and judgment satisfied in full." Denied.

The action is case for injuries to the plaintiff's person, and was commenced by her attorney, C., in February, 1891. In August, 1891, the plaintiff discharged C., and engaged other counsel, who did not, however, appear or enter their names on the docket. C. continued to act for the plaintiff, and remained her only attorney of record. September 25, 1891, the defendants, by their attorney, in good faith, without knowledge, or, so far as appears, reason, to suppose that C. was not the plaintiff's attorney, entered into the foregoing agreement, and paid the stipulated sum ($1,000) to C., who appropriated the same to his own use, and absconded.

[Opinion of Carpenter, J., denying motion, omitted.]

The plaintiff moved for a rehearing.

Blodgett, J. In arriving at the conclusion that the motion must be denied, the authorities have not been overlooked which hold that an infant cannot employ an attorney or an agent, or make a valid agreement to compromise his suit (Biddell v. Dowse, 6 Barn. & C. 255; Armitage v. Widoe, 36 Mich. 124; Lawson, Rights, Rem. & Prac. § 824; Tapley v. McGee, 6 Ind. 56; Wainwright v. Wilkinson, 62 Md. 146), or those which hold that the "next friend" of an infant is not his agent or attorney, but an officer of the court, who derives his authority not from the infant, but from the court (Guild v. Cranston, 8 Cush. [Mass.] 506; Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530; Morgan v. Thorne, 7 Mees. & W. 400). However this may be, it must be conceded that rights and remedies are as much the inherent birthright of an infant as of an adult, and, if this be so, it necessarily follows from his disability to enforce such rights and remedies that the infant must have the right to enforce them through the assistance of another. By what name such other person may be called is immaterial. He may be styled, or may be in fact, the guardian, the parent, or the next friend; but, in the very nature of things, he is, and must be held to be, the representative of the infant, and to have the power to bind him by his proper and lawful acts. Among such acts, is that of bringing suit for any cause of action which has accrued in the infant's favor; and for this purpose the representative may, in the exercise of an undoubted authority, employ an attorney at law in the management and control of the suit (Davis v. Merrill, 47 N. H. 208, 210, 211), which, "although attended by a next friend, is the suit of the infant" (Bartlett v. Batts, 14 Ga. 539). In such a case, the attorney becomes clothed with the ordinary powers pertaining to an attorney of record. Railroad Co. v. Fitzpatrick, 36 Md. 619, 628. His authority is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied. The bringing of a suit in the infant's behalf being rightful, it follows, as a legal consequence, that, if judgment is properly rendered against him, he will be concluded by it (Guild v. Cranston, 8 Cush. [Mass.] 506, 509; Tripp v. Gifford, supra); for there is no distinction between an infant and an adult with regard to the binding effect of a judgment (Smith v. McDonald, 42 Cal. 484; Ralston v. Lahee, 8 Iowa, 23, 74 Am. Dec. 291; Waring v. Reynolds, 3 B. Mon. [Ky.] 59; Wills v. Spraggins, 3 Grat. [Va.] 567; Porter v. Robinson, 3 A. K. Marsh. [Ky.] 254, 13 Am. Dec. 153; Albee v. Winterink, 55 Iowa, 184, 7 N. W. 497; Porter v. Robinson, 13 Am. Dec. 159, note; Ralston v. Lahee, 74 Am. Dec. 298, note; Freem. Judgm. [4th Ed.] §§ 151, 513). "He will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error" (Freem. Judgm. § 513); and no recognizable distinction is believed to exist between the case of an entry of judgment in regular course by an attorney of a party sui juris and the case of a like entry by an attorney properly employed by the representative of an infant to conduct the suit. The authority of attorneys of record to make such entries is always presumed, if nothing appears to the contrary, and when made they are conclusive, as between the parties, in the absence of fraud or mistake; and we apprehend it makes no difference, practical or legal, whether the agreement of the counsel to make them is expressed orally in open court, and the entries are thereupon made upon the records by its order, or whether the agreement is reduced to writing by the counsel, and duly filed and entered upon the records, without being expressly brought to the court's attention, and without obtaining its sanction, which in practice is never refused, and, at most, is but the merest formality. In such a case, the assent of the court is to be presumed. In our opinion, the law in cases like the present one is correctly stated in Tripp v. Gifford, supra, which recognizes the fact of an extensive practice with regard to the adjustment and settlement of such cases, and in which it is said (page 109, 155 Mass., and page 208, 29 N. E. [31 Am. St. Rep. 530]): "Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made, and the judgment entered, without calling the attention of the presiding justice to it, or obtaining his approval. That such judgments conclude the minor, we have no doubt; * * * and even in equity, if a decree is rendered against him without special inquiry, he will be bound by the decree." Motion for rehearing denied.[7]

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[5] Ex parte Taylor, 8 De Gex, M. & G. 254 (1856), suit in equity. Same result reached in suits at law by the infant against his adult partner to recover what he put into the firm. Page v. Morse, 128 Mass. 99 (1880); Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379 (1887).

[6] For procedure in suits by or against infants, see 10 Am. & Eng. Enc. of Law (1st Ed.) pp. 679–697, of article on "Infants" by Edmund A. Whitman

SMITH, J., did not sit. DOE, C. J., dissented. The others concurred.

SECTION 3.—PARTICULAR CASES IN WHICH THE INFANT'S RIGHT TO DEFEND, OR TO DISAFFIRM AND RECOVER THE CONSIDERATION, ON THE GROUND OF INFANCY, IS MORE EXTENDED THAN IN ORDINARY CASES

WAPLES v. HASTINGS.

(Superior Court of Delaware, 1842. 3 Har. 403.)

Judgment confessed on bond and warrant of attorney, dated 18th of February, 1836. On the application of defendant, rule to show cause why the judgment should not be vacated, on the ground that the defendant was an infant at the date of the bond and warrant of attorney.

At the hearing it appeared that the defendant was born on the 24th of April, 1816. He was acting as a man of full age in 1836, doing business as a partner with his father; generally understood to be of age, and voted at the general election in that year. In March, 1840, he executed a paper under hand and seal, expressly to recognize and confirm this bond and warrant of attorney given to William D. Waples, in February, 1836. The judgment was confessed on the 23d of February, 1836.

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[7] But see Pittsburg, C., C. & St. L. Ry. Co. v. Haley, 170 Ill. 610, 48 N. E. 920 (1897).

NOTE ON ACTS DONE BY THE DEFENDANT AT THE INFANT'S DIRECTION.—These cannot be disaffirmed by the infant. Welch v. Welch, 103 Mass. 562 (1870).

By the Court. The bond and warrant of attorney of an infant are void. 3 Com. Dig. Enfant, B.; Co. Litt. 172, a.

The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. 3 Com. Dig. Enfant, B.; 2 Wm. Blac. 1133; 1 H. Black. 75, Saunderson v. Marr.

Even if the contract could be confirmed after full age, it would not set up the warrant of attorney. 9 Eng. Com. Law Rep. 256, Thornton v. Illingsworth.

The bond and warrant of attorney failing, the judgment is without authority and must be vacated.

The cases of suits against femes covert as femes sole, have only decided that the court will not permit the defendant to set up her coverture in a summary way, but put her to plead the coverture.

Rule absolute.[8]

TRUEBLOOD v. TRUEBLOOD.

(Supreme Court of Indiana, 1856. 8 Ind. 195, 65 Am. Dec. 756.)

Perkins, J. Bill in chancery, under the old practice, to compel a specific performance, and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845, William Trueblood was an infant, and owner of a piece of land. At that date, Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age.

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[8] Saunders v. Marr, 1 H. Black. 75 (1788), was this: A rule to show cause why a judgment entered upon the warrant of attorney to confess judgment of an infant was made absolute. The court said: "Such acts of an infant as are only voidable are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the court cannot make good, though there appear circumstances of fraud on the part of the infant." But see Krickow v. Penn. Type Manufacturing Co., 87 Ill. App. 653 (1899), where the denial of a motion to vacate a judgment entered by confession upon the warrant of attorney of an infant was affirmed; the court saying: "Even if it be conceded that appellant was under age, the proof of which is not conclusive, he should not be relieved, in equity, from his debt, without offering to do equity himself. He makes no offer to pay what the material was reasonably worth, but only asks the application in his behalf of the rule of law of non-liability for his contracts. We think the Superior Court properly refused to vacate the judgment."

The conveyance was to be upon a stated consideration. The bond is single—simply the bond of Richard—and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another—Robert Lockridge—who had notice, &c. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The Court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done.

As we have seen, the bond is not, in terms, the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. Brock v. Parker, 5 Ind. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (State v. State Bank, 5 Ind. 353); if the latter, it can be (Reeve's Dom. Rel. 240).

In the first volume of American Leading Cases (3d Ed.) p. 248 et seq., the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing, as to contracts, is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In Doe v. Roberts, 16 M. & W. 778, a case slightly like the present, in some respects, the attorney, in argument, said: "Here a tenancy has been created, either by the children, or by Hugh Thomas, acting as their agent." Parke, B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So, here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

The decree below must, therefore, be affirmed with costs.

Gookins, J., having been concerned as counsel, was absent.

Per Curiam. The decree is affirmed with costs.[9]

POSTON v. WILLIAMS.

(Kansas City Court of Appeals, Missouri, 1903. 99 Mo. App. 513, 73 S. W. 1099.)

Broaddus, J. This suit originated in a justice's court, where trial was had and judgment was for defendant, from which plaintiff appealed to the circuit court, where he recovered a verdict which was set aside on motion, from which action of the court he appealed here.

The evidence tended to show that William H. Poston, the infant, was the owner of a certain horse, which he desired to exchange for another, and for the purpose of making such exchange he and defendant entered into an arrangement which culminated in defendant exchanging plaintiff's animal for a certain black horse and a gray filly, the defendant paying fifteen dollars for the difference. The defendant surrendered the black horse to the plaintiff, but kept the filly. Later, when plaintiff learned for the first time that defendant had also obtained in the exchange the gray filly he tendered to defendant fifteen dollars in money and demanded the animal. The defendant refused to accept the money tendered and to surrender the said filly, whereupon plaintiff brought his action of replevin.

The jury were instructed by the court to the effect that if they found the facts as claimed by plaintiff they would return a verdict in his favor. Amongst other instructions, the defendant asked the court to declare as a matter of law that plaintiff was not entitled to recover on the facts proved. This declaration was refused by the court. The finding of the jury was for the plaintiff, which finding, on motion, the court set aside, and assigned as a reason therefor that the giving of plaintiff's said instruction and the refusing of the one offered by the defendant was error. [Part of opinion omitted.]

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[9] Accord: Turner v. Bondalier, 31 Mo. App. 582 (1888); Semple v. Morrison, 7 T. B. Mon. (Ky.) 298 (1828), agent of infant endorsed note payable to infant to one who sued the maker. See, also, Armitage v. Widoe, 36 Mich. 124 (1877); Philpot v. Bingham, 55 Ala. 435 (1876); Lawrence v. McArter, 10 Ohio, 38 (1840); Burns v. Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268 (1902).

It has been held, also, that a bond with a penalty executed by an infant is void, and that he cannot ratify it after coming of age: Beam v. Beatty (C. A.) 4 Ont. Law Rep. 554 (1902). See, also, collection of authorities in 18 Am. St. Rep. 611 (1890).

So the power of sale created by an infant in a mortgage has been held void, and not subject to be affirmed by the infant after coming of age. Rocks v. Cornell, 21 R. I. 532, 45 Atl. 552 (1900).

The remaining question is, was the court justified in setting the verdict aside for the reasons given? The evident conclusion by the court was, that on the facts plaintiff was not entitled to recover. The plaintiff has presented his case upon the theory that it was the opinion of the court that the action could not be maintained in the form of replevin. We will not follow his argument in that direction, but merely content ourselves in discussing plaintiff's right to recover as a matter of law, independent of the form of proceeding. The proceeding, though in replevin, is in the nature of an affirmance by the infant of the contract made by him with the defendant, in which he constituted him his agent to exchange his horse for another horse, and to obtain the full benefit of such exchange. In short, the action is against defendant as agent of plaintiff. The question raised is, was the act of the infant in appointing defendant to make said exchange of horses for him, void or voidable? In Turner v. Bondalier [31 Mo. App. 582] supra, this court held that an infant could not by power of attorney appoint an agent to make affidavit for him in a statement of replevin. Judge Ellison, who rendered the opinion of this court, reviewed many decisions of different courts on the question, among which was that of Armitage v. Widoe, 36 Mich. 124, wherein, in an opinion by Judge Cooley, it was held that the appointment by an infant of an agent to contract for him was void. The plaintiff was not authorized to recover under the facts, and the court acted properly in setting aside the finding of the jury.

The cause is therefore affirmed. All concur.

COURSOLLE v. WEYERHAUSER.

(Supreme Court of Minnesota, 1897. 69 Minn. 328, 72 N. W. 697.)

Action to determine adverse claims to 320 acres of land. The defendants claim under a conveyance made in 1874 by the attorney in fact of an infant to one Brown and mesne conveyance from him. The power of attorney was executed in 1870, when the infant was 20 years of age. The plaintiff claims under a deed by the same infant when he attained the age of 28 years.[10]

MITCHELL, J. [after holding that the infant grantor had ratified and confirmed the conveyance to Brown, made pursuant to the power of attorney of 1870, so far as the same was capable of ratification, continued:]

The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

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[10] Statement abridged from the opinion of the court.

On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to Craig v. Van Bebber (Mo. Sup.) 18 Am. St. Rep. 629 (s. c., 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569); Schouler, Dom. Rel. § 406; Ewell's Lead. Cas. 44, 45, and note; Bishop, Cont. § 930; Metcalf Cont. (2d Ed.) 48; Whitney v. Dutch, 14 Mass. 457–463, 7 Am. Dec. 229; Bool v. Mix, 17 Wend. (N. Y.) 119–131, 31 Am. Dec. 285.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority. [Balance of opinion omitted.]

Judgment affirmed.[11]

BUCK, J. I dissent from the result arrived at in the foregoing opinion.

SECTION 4.—RIGHTS REVESTING IN OR ACCRUING TO THE ADULT UPON DISAFFIRMANCE BY THE INFANT

STRAIN v. WRIGHT.

(Supreme Court of Georgia, 1849. 7 Ga. 568.)

In equity. [The facts are sufficiently stated in the opinion of the court.]

BY THE COURT—WARNER, J., delivering the opinion.

Two grounds of error are alleged to the judgment of the Court below, in this case. First, in refusing to give to the Jury the instructions asked by the counsel for the complainant. Second, in giving to the Jury the instructions as set forth in the record before us.

It appears that the defendant had purchased from the complainant's intestate a negro, for which he paid a part of the purchase money, and executed his note for the balance. At the time this contract was executed, the defendant was an infant, who took the negro into his possession. When sued upon the note given for the balance of the purchase money for the negro, after attaining full age, he filed the plea of infancy to the action upon the note, and at the trial, sustained his plea by proof, whereupon the plaintiff in that action dismissed it.

The complainant then filed his bill, setting forth the facts of the case, and prayed for a decree to have the negro sold, and out of the proceeds of such sale, to pay the defendant the amount paid by him to the complainant's intestate, and the balance thereof to be paid to the complainant.

The instructions asked by the complainant's counsel assert the proposition, that the contract for the sale of the negro was disaffirmed by the defendant, by his plea of infancy to the action on the note, and that the title to the negro revested in the original vendor, or his legal representative, and that it was competent for a Court of Equity to decree a sale of the negro, so as to adjust the equitable interests of the respective parties to the contract, according to the facts of this particular case. The instructions requested were, in our judgment, correct in point of law, and ought to have been given.

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[11] Accord: Belton v. Briggs, 4 Desaus. (S. C.) 465 (1814), infant's agent to sell land; Hardy v. Waters, 38 Me. 450 (1853), infant's agent could not indorse note payable to infant to one who sued the maker; Towle v. Dresser, 73 Me. 252 (1882); Hastings v. Dollarhide, 24 Cal. 195 (1864); Ward v. Steamboat Little Red, 8 Mo. 358 (1844); Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (1903).

1. The contracts of infants are not void, but voidable at their election, when they arrive at twenty-one years of age. 2 Kent's Com. 235; Roof v. Stafford, 7 Cow. (N. Y.) 179. By his plea of infancy to the action brought upon the note given in part payment for the negro, the defendant disaffirmed the contract for the sale of him.

2. An obligation or other deed of an infant, shall be avoided by plea of within age. 3 Comyn's Dig. 550, letter c, 5. The plea of infancy was his own voluntary act, and manifested his intention to repudiate the contract, and he is therefore bound by it. The defendant will not be permitted to disaffirm the contract, when sued for the purchase money by the vendor, and when the latter seeks to recover the property, in consequence of such disaffirmance, to refuse to give it up, and then insist upon such refusal as evidence of an affirmance of the contract, as was contended by the counsel for the defendant in error. When the defendant filed his plea of infancy to the contract, he made his election to disaffirm it, and he is bound by such election.

It has been insisted on the argument, that when an infant has received property by virtue of an executed contract made with an adult, that when he arrives of age and disaffirms the contract, by his plea of infancy to the note given for the property so received, the adult cannot recover from the infant, either the purchase money for the property sold to him, or the property. Upon what legal principle this doctrine can be supported, we are unable to determine; certainly upon no just principle.

3. The infant, in this case, derived his title to the negro by virtue of the contract made with the complainant's intestate. When of age he disaffirms the contract, and it is cancelled for his benefit. The contract of sale being rescinded at the instance of the infant, what becomes of his title to the property derived from the vendor? According to legal rules and common sense, it would seem that the title to the property would revest in the vendor; and yet the authorities to be found in the books upon this question are not as harmonious as might be expected. We, however, adopt the rule as stated by Chancellor Kent. If the infant avoids an executed contract, when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side, without returning the equivalent on the other. 2 Kent's Com. 240. The cases of Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, Roberts v. Wiggin, 1 N. H. R. 73, 8 Am. Dec. 38, and Roof v.

Stafford, 7 Cow. (N. Y.) 179, are cited in support of this doctrine. In Badger v. Phinney, the court inquire, after the contract has been rescinded, what is to be done then? "Should not the plaintiff and defendant be placed in the same situation as if no such contract had been made? But that will not do for the defendant. His notion of rescinding is to keep all and to pay nothing on the contract." So here, the defendant wishes to keep the negro, and not pay the note given for the purchase money. The rule adopted in Badger v. Phinney, is recognized by the Supreme Court of Alabama, in Jefford's Adm'r v. Ringgold & Co., 6 Ala. 548. See, also, Boyden v. Boyden, 9 Metc. (Mass.) 519. We cannot sanction the doctrine contended for, that an infant who obtains property by virtue of a contract with an adult, may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant, would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights. There is no doubt, in the view we have taken of this case, that if no part of the purchase money for the negro had been paid to the vendor, and the note had been given for the entire amount thereof, that upon the disaffirmance of the contract by the defendant, an action of trover might have been maintained at Law by the vendor, for the recovery of the property; but part of the purchase money having been paid to the vendor by the defendant for the property, the remedy of the vendor, at Law, was inadequate and difficult. The peculiar facts of the case raised such an equity in favor of the complainant, as gave to the Court of Equity jurisdiction, for the purpose of settling the rights of the respective parties. The charge of the Court to the Jury was a denial of the complainant's right to the relief which he prayed—to have the negro sold, and out of the proceeds thereof, to pay the defendant the amount paid by him, and the balance to be paid to the vendor. The contract having been disaffirmed by the defendant, such a decree, in our judgment, would have properly adjusted the rights of the respective parties, according to the facts as made by the record before us, and ought to have been so adjudged.

Let the judgment of the Court below be reversed, on the ground that the Court erred in not giving the instructions as requested by the complainant's counsel, and in giving the instructions as set forth in the record.[12]

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[12] Accord: Heath v. West, 28 N. H. 101 (1853); Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101 (1844); Ison v. Cornett, 75 S. W. 204, 25 Ky. Law Rep. 366, (1903); McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 South. 417, 12 L. R. A. 136 (1890).

In Sanger v. Hibbard, 2 Ind. T. 547, 53 S. W. 330 (1899), it was held that an infant was liable on a dissolving bond given to release a judgment upon chattels by the seller of the chattels to the infant, although after the bond was given the infant sold and disposed of the chattels.

MacGREAL v. TAYLOR.

(Supreme Court of United States, 1896. 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326.)

Bill in equity to foreclose a mortgage executed by Mrs. Moore (now Mrs. MacGreal) to Mrs. Utermehle, dated October 22, 1889. The execution of this mortgage was consummated pursuant to an agreement between Mrs. Moore and Mrs. Utermehle. Mrs. Moore was in default in respect of the payment of the sum secured by certain prior trust deeds, dated, respectively, 1886 and 1887, upon which foreclosure and sale were threatened, and having no property except the premises in question, and desiring also to improve the same by the erection of a substantial building for the purposes of a home, applied to Mrs. Utermehle for a loan of $8,000, to be secured by a trust deed in the usual form on the land and premises.

She represented the title to the premises to be good and unincumbered otherwise than by the above trust deeds. Her application, the bill states, was accompanied by an assurance upon her part that she would immediately commence the construction of a substantial brick building upon the lot and premises, with suitable provisions to secure the payment or application of all the proceeds of the loan "not required to take up the said overdue notes, representing said unpaid purchase money, taxes then due, expense of examination of title to said land and premises, conveyancing and other incidental expenses incurred on account of the negotiation of said loan, all of which were also to be taken up or paid therefrom towards such construction." Relying upon said premises, and the proposed security offered by her, $8,000, was loaned by Mrs. Utermehle to Mrs. Moore. Out of that sum, pursuant to the agreement or understanding between Mrs. Moore and Mrs. Utermehle, the latter took up the notes representing the unpaid purchase money secured by the above trust deeds, and paid the taxes then due on the property, together with the expense of examining the title and other expenses, all amounting to $3,291.99, which sum was paid directly by Mrs. Utermehle to the holders of the notes and the parties to whom the expenses and taxes were payable. Thereupon Mrs. Moore procured the services of J. W. Myers, a builder, and entered upon the construction of a substantial brick dwelling upon the lot and premises, as agreed upon, and as the condition of the loan to her, and the balance of the $8,000 was expended in the purchase of materials furnished for and used in its construction, and to pay laborers, mechanics, and others for work done thereon. The house was completed, and is known as "No. 1612 Nineteenth Street Northwest." Mrs. Moore moved into it about two months after its completion.

Subsequently, on the 23d of June, 1890, Mrs. MacGreal executed and placed of record an instrument, in which she gave notice that she disaffirmed the deed of trust of October 22, 1889, and the note described in it, on the ground of her minority at the time of its execution. There were other acts of disaffirmance.

It is not disputed that Mrs. MacGreal arrived at full age on the 20th day of June, 1890. And it may be stated, as the result of the testimony, that when the deed of October 22, 1889, was executed, no inquiry was made as to her age, nor did she make any representation on that subject.

In the Supreme Court of the District of Columbia a decree was rendered dismissing the bill. But in the Court of Appeals of the District that decree was reversed, and a decree passed which adjudged that there was due from Mrs. MacGreal to the executrices of Mrs. Utermehle the sum of $8,000, with interest at the rate of six per cent. per annum until paid, and the costs of suit; and directing that, on default in the payment of principal, interest, and costs aforesaid by a day named, the lot in question, with the improvements thereon, be sold, and the proceeds applied in payment of such sum. Utermehle v. McGreal, 1 App. D. C. 359.[13]

Mr. Justice HARLAN [after stating the case and commenting upon Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345, and Sims v. Everhardt, 100 U. S. 300, 26 L. Ed. 87, continued:]

In the present case it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable, and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied, and was applied, in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, and cannot be returned.

[The court then cited Boyden v. Boyden, 9 Metc. 519, 521, Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, and other cases, and continued:]

If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will devest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589. Or, if he retains the use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden v. Boyden, 9 Metc. (Mass.) 519; Robbins v. Eaton, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. Dana v. Stearns, 3 Cush. (Mass.) 372–376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in statu quo. Tucker v. Moreland, 10 Pet. 65–74, 9 L. Ed. 345; Shaw v. Boyd, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368. See, also, 1 Am. Lead. Cas. (5th Ed.) *224, *232, *249, *259; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 340, 76 Am. Dec. 209; Cresinger v. Welch's Lessee, 15 Ohio, 156, 45 Am. Dec. 565; Eureka Co. v. Edwards, 71 Ala. 248, 256, 46 Am. Rep. 314; Corey v. Burton, 32 Mich. 30; Price v. Furman, 27 Vt. 268, 271, 65 Am. Dec. 194; Robinson v. Weeks, 56 Me. 102, 107; Carpenter v. Carpenter, 45 Ind. 142, 146; Harvey v. Briggs, 68 Miss. 60, 66, 8 South. 274, 10 L. R. A. 62; Railway v. Higgins, 44 Ark. 293, 297; Reynolds v. McCurry, 100 Ill. 356, 359; Tyler, Inf. § 37, and authorities cited.

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[13] Statement abridged from the opinion.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between herself and the estate of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was incumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts, when the deed of 1889 was executed, cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8,000 to be used in meeting those debts and in improving the lot in question. 1 Jones, Mortg. §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held —and gross injustice will be done in this case if it be not so held— that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.

But we are of opinion that the court below erred in adjudging, as, in effect, it did adjudge, that the appellees are entitled to have their entire debt first paid, even if all the proceeds of sale be required for that purpose. The decree should have been so framed as to place Mrs. MacGreal, so far as it could be done, in the position occupied by her at the time the deed of trust was given; for only by such a decree can the privilege of infancy, resulting from incapacity to contract, be effectively protected. A decree giving the appellees a preference in the distribution of the proceeds of sale for their entire claim necessarily must rest upon the ground that one who obtains from an infant a deed of trust conveying his real estate to secure the repayment of money loaned to him, and to be applied, and which is applied, in improving such estate, may thereby make the disaffirmance of the infant ineffectual in every case where the property, upon being sold, does not bring more than the debt attempted to be secured. But no such result can properly happen if the court enforces the established rule that, upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance. As Mrs. MacGreal ought not to hold the property in its improved state without accounting, as far as possible, for the money used in protecting it from sale for existing liens, and in improving it, there must be a sale in order that justice may be done. But as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her of the interest she had at the time the deed of trust was executed.

The decree for a sale was proper, but, upon the showing made by this record, it should direct the proceeds to be applied—First, in repaying to the appellees, with interest, the sums paid by Mrs. Utermehle in discharge of the prior liens created by the deeds of 1886 and 1887 and by the taxes then upon the property; second, in paying Mrs. MacGreal an amount equal to the value of the lot at the institution of this suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with Mrs. Utermehle's money. Lynde v. McGregor, 13 Allen, 182, 185. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured. If the property, in its improved condition, does not bring enough to pay the whole debt due the appellees, they will be without remedy for the deficiency. If any balance should remain after satisfying the above claims in the order mentioned, it will belong to Mrs. MacGreal.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed.[14]

The Chief Justice and Mr. Justice Brown are of opinion that the judgment should be affirmed.

BENNETT v. McLAUGHLIN.

(Appellate Court of Illinois, 1883. 13 Ill. App. 349.)

Higbee, J. This is an action of replevin by appellant, to recover the possession of a sewing machine, received and held by appellee under the following contract:

"This agreement, made this 20th day of August, 1880, certifies that I have hired from J. H. H. Bennett, one White sewing machine, numbered 157,382, for the use of which I hereby agree to pay him, at his office in Jacksonville, the sum of fifty dollars, as follows: ten dollars to be paid upon the signing hereof, and the balance of forty dollars to be in installments of five dollars each, on the first day of every month, until all is paid; five dollars to be deducted from the above total amount if payments are made promptly at the rate per month agreed upon; payments to commence October 1, 1880.

"Having received said sewing machine in good order and condition, I hereby agree to hold the same subject to the order of said J. H. H.

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[14] See, also, Thurston v. Nottingham, [1902] 1 Ch. 1, ante, p. 143. See, however, New York Building Co. v. Fisher, 23 App. Div. 363, 48 N. Y. Supp. 152 (1897), ante, p. 126.

Bennett, or his agent, as his property; and upon my failure to make any of the payments as herein specified, or upon any attempt or designed removal of said machine from the city of Jacksonville, without his written consent, I also hereby agree to restore the same to his possession, upon demand of himself or his agent.

"[Signed] Jennie McLaughlin.

"In presence of J. W. Sampson."

The first payment of ten dollars was made at the time the contract was executed, appellant receiving an old machine in lieu of money therefor. Appellee also paid three dollars, June 25, 1881, two dollars, August 27, 1881, and one dollar and fifty cents, December 10, 1881; in all, including old machine, sixteen dollars.

In March, 1882, appellee refused to make further payments, or surrender up the machine to appellant, on his demanding the same. The defense in the trial court, as appears by the record, was that appellee was an infant at the time she made the contract and that the old machine was worth as much as the new one she received from appellant. This defense was supported by the evidence of appellee and her mother, both of whom testified that the old machine, delivered to appellant for the first payment of $10, was worth as much as the new one she received from him; that it belonged to appellee's mother who was present and knew it was sold to appellant for $10, and made no objection thereto. Appellant testifies that it was of no value except as old iron.

The trial resulted in a verdict and judgment against appellant, from which he appeals to this court and assigns for error, the giving, at the instance of appellee, the following instruction, to which he at the time excepted: "If the defendant signed the lease while a minor and paid as much or more than the machine was worth, then the plaintiff could not recover, unless she ratified the contract; and that unless the plaintiff returned, or offered to return all that he had received for the machine, less the value of the use of it, he could not recover."

When appellee refused to make further payments or surrender up the property, she had the same in her possession and was of full age, having attained her majority in December, 1881.

Her right to avoid the contract can not be questioned, but it is a privilege secured to her by the law for her own protection, and she is not permitted to use it as a sword to injure others; she can not retain the property purchased, after arriving at her majority, and at the same time repudiate the contract, under which she received it; and if she does repudiate the contract under such circumstances, the title remains in the vendor, and he is entitled to the immediate possession of the property. Reeve's Domestic Relations, p. 244; Heath v. West, 8 Fost. (N. H.) 101; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Gray v. Lessington, 2 Bosw. (N. Y.) 257; Tyler on Infancy and Coverture, p. 78.

Nor can she be permitted to retain the property, because the partial payment made was equal to its entire value; she must either abide by the contract or rescind it, and in the latter case, if she still has the property she received, under the contract, in her possession, she must offer to return it, when she may recover back the payments made by her. If, however, she has wasted or squandered the consideration received by her during infancy, a different rule prevails, and the adult party is remediless. Tyler on Infancy and Coverture, p. 78.

The instruction did not correctly state the law and was improperly given by the court, for which reason the judgment is reversed and the cause remanded.

Reversed and remanded.

SECTION 5.—EFFECT OF DISAFFIRMANCE UPON TITLE AS HELD BY OR FROM AN INFANT PRIOR TO DISAFFIRMANCE

FITTS v. HALL.

(Superior Court of Judicature of New Hampshire, 1838. 9 N. H. 441.)

The plaintiff was induced to sell hats to the defendant, relying upon the latter's false and fraudulent representations that he was of full age. The defendant gave to the plaintiff his note for the price. The plaintiff sued on the note and the defendant pleaded infancy and recovered judgment and costs.

This action was then brought. There were two counts, one in case for deceit and the other in trover.

The court instructed the jury, that if they were satisfied, from the plaintiff's evidence, of the truth of the facts set forth in the declaration, they might for the purpose of this trial consider the action sustainable in point of law.

Verdict for the plaintiff. Motion that verdict be set aside and non-suit entered.[15]

Parker, C. J. The general principle applicable to this case is, that an infant is liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. 6 Cranch, 231, 3 L. Ed. 207, Vasse v. Smith; 3 Pick. (Mass.) 492, Homer v. Thwing. And in detinue, where he received skins to finish, and afterwards withheld them. 4 Bos. & Pul. 140, Mills v. Graham. And assumpsit for money had and received, has been sustained against an infant for money embezzled. 1 Esp. Rep. 172, Bristow v. Eastman; Peake's Rep. 222, s. c.

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[15] Statement abridged.

But a matter of contract, or arising ex contractu and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; held that infancy was a good plea in bar. 2 Marshall's Rep. 485, Green v. Greenbank; 4 E. C. L. Rep. 375, s. c. [Part of opinion omitted.]

The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he can not redeliver them, neither his refusal to pay, nor a refusal to deliver the goods, can be considered as any thing more than a breach of contract. A refusal to pay is a breach of the express contract, and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such a case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it.[16]

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[16] Accord: Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755 (1903).

In Lamkin v. Ledoux, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104 (1906), an infant bought goods of the plaintiff and sold some of them after

Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract, upon which he received the goods, by his misrepresentations. The goods were, notwithstanding, received upon a contract; and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held, of itself, to be a conversion.

If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the count in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. 15 Mass. 359, Badger v. Phinney. In this latter case, the defence of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the court said, "the basis of this contract has failed, from the fault, if not the fraud of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. Vasse v. Smith, 6 Cranch, 231, 3 L. Ed. 207; Mills v. Graham, 4 B. & Pul. 140, before cited.

[The court then considered whether this action could be maintained against the defendant for the fraudulent representation that he was of age, and held that it could. This portion of the opinion is given post, p. 324.]

WEAVER v. JONES.

(Supreme Court of Alabama, 1854. 24 Ala. 420.)

CHILTON, C. J. Jones sued Weaver in assumpsit, for the use and occupation of a lot in Selma. It appears from a bill of exceptions, which was sealed upon the trial, that the plaintiff, Jones, while an infant, had sold the lot, and executed his bond for title in the usual

he came of age. Upon being sued for the price he pleaded infancy. The contention that by disaffirmance title vested by relation back in the seller, and hence the sale by the infant after he came of age was a sale of the plaintiff's goods, and that therefore the defendant was liable for their value, or for value received, was denied.

form; after he arrived at age, he disaffirmed the contract, paid Weaver back the purchase money, with the interest, and received back his bond. Weaver, in the mean time, had made valuable and permanent improvements on the lot, in the erection of a livery stable. This suit is brought by Jones, to recover rent for the time Weaver occupied the lot; and Weaver insists, that he should be allowed to recoup the value of his improvements, which gave to the lot its principal yearly value; the rent, aside from such improvements, being quite inconsiderable.

The court, among other things, charged the jury, that, if the plaintiff (Jones) was a minor at the time of selling the lot, and they should find that such sale was not an advantageous one to the plaintiff, then the contract would be void, and the damages could not be recouped.

The counsel for the defendant in error endeavors to maintain the correctness of this charge, upon the alleged ground, that a bond with a penalty, given by an infant, is absolutely void, and that being void, the defendant below must be regarded in the light of a mere trespasser, and as such not entitled to recoup for improvements.

If this position be correct, we think it is very clear the plaintiff, Jones, has no standing in court; for the action of assumpsit will not lie, in the absence of a contract either expressed or implied; and no contract for the payment of rent is implied, by law, as against a mere naked trespasser. The owner, in such case, must resort to his action of trespass, to recover damages for the tortious entry and holding of the premises. True, there are cases, where the owner of a term may elect to treat one who trespasses on him as his tenant, after the term expires; for, otherwise, he would be remediless. Such was the case of Catterlin v. Spinks, in 16 Ala. 467. So, also, in cases of permissive holding, as where the party in possession holds under a verbal contract of purchase, which he repudiates. The case of Davidson v. Earnest, in 7 Ala. 817, furnishes an illustration of this latter class. See also Rochester v. Pierce, 1 Camp. 466, and Hull v. Vaughn, 6 Price Exchq. Rep. 157. If, however, the bond in this case be absolutely void—a mere nullity—and the party a mere trespasser, the case falls under neither of the qualifications above stated. There would be no demise, express or implied, and no permissive holding. To entitle the plaintiff below to a recovery, it is, therefore, necessary to affirm the validity of the bond for some purpose, as amounting at least to a permission to the plaintiff in error to occupy.

But is a bond for title, given by an infant, an absolute nullity? The old cases, and several elementary writers who follow them, maintain the affirmative of the proposition; but we think it clear, both upon principle and the current of modern cases, that it is not.

The object of the rule which enables an infant to repudiate his contracts, when he arrives at full age, is to furnish him a shield or protection against the improvident bargains he may enter into, resulting from presumed incapacity, by reason of his youth, to contract. It may often happen, that his contract may prove a very beneficial one to him, and he may desire, when of age, to affirm it, which he could not do, if it were void.

The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority. Parsons on Contracts, 224 and notes; 1 Amer. Leading Cases, 103, 104. The rule, as recognized by the charge, that the court, or (as in this case) the jury, must determine whether the contract was beneficial or prejudicial to the infant, and hold the contract voidable or void according to the result of such finding, has been rejected by many of the courts in modern times, as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely, the benefit of the infant. It is certainly more conducive to his benefit, to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine this question for him. Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Parsons on Con., note e to page 244.

We must consider Weaver as holding possession of the lot under a contract for its purchase, which was voidable, and as holding by permission of Jones, the plaintiff, who may, therefore, treat him as his tenant, and maintain this action of indebitatus assumpsit for use and occupation.

The question then arises, What damage has Jones sustained by the failure of Weaver to comply with the implied assumpsit to pay reasonable compensation for the use of the premises?

In this equitable action of indebitatus assumpsit, can the plaintiff recover for the use and enjoyment of permanent and valuable improvements, which the defendant himself has erected, without allowing a discount or abatement of his recovery by way of compensation for such improvements? If they were erected in good faith, under a contract of purchase, which, though voidable, was not void, we feel satisfied that, when the infant disaffirms the contract, the law will not raise in his favor an assumpsit on the part of the defendant to pay for the use of the permanent improvements made upon the faith of the contract, without considering the improvements, and abating the recovery to the extent of their permanent value. It is thus that the courts give effect to the general rule, that in actions arising upon contracts, the plaintiff recovers the actual damage sustained. Sedgwick on Damages, pp. 430 to 446; 2 Greenl. Ev. 208. And if such be the rule in regard to express contract, much more would the court look to circumstances growing out of, and connected with an implied undertaking. See upon recoupment, Hatchett v. Gibson, 13 Ala. 594; Costigan v. Mohawk & H. R. R. Co., 2 Denio (N. Y.) 616, 43 Am. Dec. 758.

It follows, therefore, that the court erred in respect of the claim for improvements by way of recoupment.

We deem it unnecessary to examine the other questions raised upon the admission of evidence, since it is probable that they may not arise upon a subsequent trial.

Let the judgment be reversed, and the cause remanded.[17]

TOWER-DOYLE COMMISSION CO. v. SMITH.

(Kansas City Court of Appeals, Missouri, 1900. 86 Mo. App. 490.)

ELLISON, J. This is an action of replevin for a lot of steers which were of proper age and condition for fattening. The plaintiff recovered judgment in the trial court.

It appears that plaintiff sold the cattle to defendant for $850, the latter executed his note due in four months to plaintiff together with a chattel mortgage on the cattle to secure the same. Defendant was an infant at the time for his purchase and the date of the note and mortgage. Plaintiff delivered the cattle to him and he fed them a lot of corn of the value of $450. His services in feeding and attending the cattle were of the value of $50. Defendant became of age shortly before the note became due; he then notified plaintiff that he rescinded the contract on account of infancy and offered to return the cattle to plaintiff upon payment to him of the value of the feed and services aforesaid, for which he claimed a lien. Plaintiff in turn offered to give up the note and mortgage and receive the cattle, but refused to pay for the feed and services.

The question for decision is, whether, under the foregoing facts, defendant is entitled to a lien?

The law grants the privilege to an infant, on becoming of age, to disaffirm a contract made by him while a minor. But to do so, he must return the consideration received, if he yet has it, or the fruits of it. If he has squandered it, or otherwise made way with it and can not return it, he may nevertheless repudiate the contract and the adult who contracted with him must suffer the loss. Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194. So he may avoid his special contract for personal services and recover on a quantum meruit. Lowe v. Sinklear, 27 Mo. 308; Thompson v. Marshall, 50 Mo. App.

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[17] See, also, Burton v. Little, 9 Bush (Ky.) 307 (1873); French v. McAndrew, 61 Miss. 187 (1883); Jones v. Cohen, 82 N. C. 75 (1880); Wornock v. Loar, 11 S. W. 438, 11 Ky. Law Rep. 6 (1889); McGinn v. Shaeffer, 7 Watts (Pa.) 412 (1838); Sewell v. Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606 (1892).

145; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Whitmash v. Hall, 3 Denio (N. Y.) 375; Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Medbury v. Watrous, 7 Hill (N. Y.) 110; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

We are of the opinion that the principle of the foregoing statements of the law is applicable to the facts of this case. It was plaintiff's fault to put the cattle with defendant, who was incapable of contracting. Plaintiff can not now be allowed to receive the benefit accruing without paying for it. In theory of the law the infant can repudiate the contract for the reason that he has had put upon him an improvident bargain. The adult should not be the gainer by this. The contract of an infant, when repudiated by him, leaves the parties without a contract and the infant, therefore, has such rights as would exist had there been no contract. In this case, plaintiff, in effect, turned over the possession of the cattle to defendant without a contract of sale and mortgage for the purchase money and defendant had fed and cared for them for plaintiff's benefit. He is, therefore, entitled to a lien for this under the general statute (section 4228, Rev. St. 1899 [page 2319, Ann. St. 1906]), providing for liens where animals are boarded and cared for.

The judgment will be reversed and cause remanded. All concur.

SECTION 6.—CHARACTER (IN ABSENCE OF DISAFFIRMANCE) OF INFANT'S CONTRACTS AND CONVEYANCES, SO FAR AS THE SAME MAY BE COLLATERALLY INVOLVED BETWEEN THE PARTIES, AND SO FAR AS THIRD PARTIES ARE CONCERNED

HOLT v. WARD CLARENCIEUX.

(Court of King's Bench, 1732. 2 Str. 937.)

The plaintiff declared, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4000.

The defendant with leave of the court pleaded double (viz.) non assumpsit, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

The plaintiff joins issue on the non assumpsit, and a verdict is found for her, with £2000 damages. And as to the plea of infancy demurred.

And now this term the Chief Justice [Lord Raymond] delivered the resolution of the court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is nudum pactum, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation: and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him, as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election. Cro. Car. 502; 2 Roll. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Ven. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infant's contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

ZOUCH ex dimiss. ABBOT et al. v. PARSONS.

(Court of King's Bench, 1765. 3 Burrow, 1794.)

Ejectment. Special case. John Bicknell, being seised in fee of the messuage and lands in the declaration mentioned, by indenture of lease and release dated 24th March, 1750, and 25th March, 1751, conveyed the premises to William Cook and his heirs, by way of mortgage, for securing the repayment of £280. William Cook afterwards died, leaving John Lamb Cook, an infant, his eldest son and heir at law; and also leaving his widow Elizabeth Cook and the said John Lamb Cook his joint-executors and residuary legatees.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. John Williams an attorney, and desired him to procure the sum of £400. upon the same security; in order to pay off the said mortgage to the Cooks, and for other purposes. Williams applied to the lessors of the plaintiff, who agreed to advance the same: and by indentures of lease and release bearing date respectively on the 29th and 30th of June, 1761, between the said John Lamb Cook (then being an infant of between 16 & 17 years of age) and the said Elizabeth Cook, of the 1st part; the said John Bicknell of the 2d part; and the said Henry Abbot and Catharine Hallet, (lessors of the plaintiff) of the 3d part; the said John Lamb Cook and Elizabeth Cook, in consideration of the sum of £280. in the said release mentioned to be to them paid by the lessors of the plaintiff, granted and released, and the said John Bicknell, as well for the consideration aforesaid, as for the further sum of £120. to him mentioned to be paid by said lessors of the plaintiff, granted, ratified and confirmed the said premises to the said Abbot and Hallet, and their heirs, to hold to them their heirs and assigns for ever.

The said Mr. Williams when he drew the last mentioned mortgage-deed, apprehended that the whole principal sum of £280. continued due to the representatives of the said William Cook, upon his said mortgage; and therefore expressed that sum to be the consideration paid to them: but, in fact, the sum of £100. only principal money, and £9. for interest, then remained due thereon; the said William Cook having been paid the other £180. in his life-time; and accordingly, at the time of the execution of the said last mentioned indentures of lease and release, Elizabeth Cook received £109. being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of £400. was received by the said John Bicknell, from the lessors of the plaintiff.

The said John Bicknell continued in possession of the premises from the time of his conveyance thereof to the said William Cook, until the year 1756; when he conveyed the premises, by way of mortgage for £200. to one Thomas Thorne, for a term of years, who in March, 1762, assigned the said term to the defendant Henry Parsons, in consideration of the sum of £228. in the said deed of assignment mentioned to be the principal, interest and costs then due from Bicknell to the said Thorne: but before the assignment to the defendant, Mr. Williams, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to William Cook, and of the assignment of it to the lessors of the plaintiff.

On the 27th day of March, 1764, two days before the day of holding the assizes at Taunton, the said John Lamb Cook made an entry on the premises, in order to avoid his said lease and release to the lessors of the plaintiff.

The question is "Whether the lessors of the plaintiff are entitled to recover the premises."[18]

Lord MANSFIELD, after stating the case minutely, now delivered the resolution of the court to the following effect:

The merits of this cause turn upon two general questions; 1st, Whether this conveyance is good, and binds the infant; 2dly, If it does not bind the infant,—Whether the defendant can take advantage of the infancy, and on that account object to it.

[The court then held that the conveyance bound the infant. The opinion of Lord Mansfield then proceeds as follows:]

But supposing it not binding against him, or those who may stand in his place—

The second question is, "Whether the defendant can take advantage of the infancy; and, on that account, object to the conveyance."

This depends upon two points: 1st: "Whether this conveyance be void; or voidable only": 2dly: If voidable only, whether the infant, by his entry before the assizes, had absolutely avoided it."

It is not settled, what is the true ground upon which an infant's deed is voidable only:—Whether "the solemnity of the instrument is sufficient"; or "it depends upon the semblance of benefit to the infant, from the matter of the deed upon the face of it."

As to the first, the solemnity of the instrument—We think the law is, as laid down by Perkins [§ 12]—That "All such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate." The words "Which do take effect" are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest.

In Bro. Abr. title "Dum fuit infra ætatem" pl. 1 (which cites 46 Edw. III, 34,) it is noted "That a dum fuit infra ætatem was admitted to lie of a rent: and yet, by some, the grant of an infant was void and not voidable." But (says the book) "It is not so: for then this action would not lie. And besides, the delivery of a deed cannot be void; but only voidable."

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[18] Statement abridged and arguments omitted.

There is no difference, in this respect, between a feoffment, and deeds which convey an interest. The reason is the same.

The delivery of the deed must be in the presence of witnesses, as much as the livery of seisin. The ceremony is as solemn. The presumption "That the witnesses would not attest, if they saw him an infant," holds equally as to both.

Littleton, who writes with great accuracy and precision, puts them both upon the same foot. He says [Sec. 259]—"If before the age of 21, any deed or feoffment, grant, release, confirmation, obligation or other writing be made by any of them, &c.; all serve for nothing, and may be avoided."

In 2 Inst. 673, a bargain and sale inrolled by an infant is denied to be matter of record which the infant must avoid during his minority: but the book says, "He may avoid it, when he will."

An infant, or they who stand in his place, can not plead "non est factum," and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed: and that plea avoids it, by relation back to the delivery. The reason of this is, because it has an operation from the delivery; and not because it has the form of a deed.

The deed of a feme-covert has the form: but she may plead "non est factum;" because it has no operation.

The distinction between the deeds of femes-covert, and of infants, is important: the first, are void; the second voidable.

Perkins, sect. 154 [title, Faites, p. 32] says—"And it is to be known, that a deed cannot have and take effect at every delivery, as a deed: for, if the first delivery take any effect, the second is void.—As in case an infant makes a deed, and deliver the same as his deed &c. and afterwards, when he comes of full age, delivers it again as his deed; this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed; this delivery is merely void: and therefore, if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is good and effectual."

Two objections were made at the bar, to this proposition, at least, in its extent. 1st. That leases by an infant, by deed, upon which no rent is reserved, are absolutely void: therefore, the criterion, "Whether the deed is void or voidable," does not depend upon the delivery; but upon the matter and contents—"Whether it may possibly be for the infant's benefit." 2dly. A surrender by an infant, by deed, is absolutely void: therefore all deeds are not voidable only.

As to the first—There are many obiter sayings; but there is no sufficient authority, clearly to outweigh the reasons against this position: I cannot find a case adjudged singly upon this ground. What looks the likest to an authority, is the opinion of Wray and Southcote against Gawdy, in Humphreston's Case, 16 Eliz. Moore, 105, and 2

Leon. 216 [V. also S. C. in Benlo. 195; Owen, 64; Dyer, 337, a; 1 And. 40]: but there, the judgment was upon the right and merits of the case, and not upon the point of the lease. The question, as to the lease, arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (Wray and Southcote) held "That, no rent being reserved, there was no semblance of benefit to the infant." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol.

But reason soon prevailed; and it has been long settled, "That an infant may make a lease, without rent, to try his title." Very prejudicial leases may be made; though a nominal rent be reserved: and there may be most beneficial considerations for a lease though no rent be reserved.

What seems decisive is, "That the lessee can, in no case, avoid the lease, on account of the infancy of the lessor:" which shews it not to be void, but voidable only. And it is better for infants, that they should have an election.

As to the second—The authority of Lloyd v. Gregory [Lloyd v. Gregory is reported in Cro. Car. 502, and Sir William Jones, 405, and is abridged in 2 Ro. Abr. 24, title "Faites," letter I, pl. 6, and 495, title "Surrender," letter F, pl. 7, and in 1 Ro. Abr. 728, title "Enfants," letter B, pl. 2 and 3] was cited: and sayings arguendo, in Thompson v. Leach [3 Lev. 284; 2 Ventr. 198, 199; 3 Mod. 296, 301; 2 Salk. 618; Parliament Cases, 150; 1 Shower, 296; Comberb. 438, 468; Carthew, 211, 435; Equity Cases Abridged, pa. 278, pl. 3; 3 Salk. 300; 12 Mod. 173; and Holt, 357, 623].

The case of Lloyd v. Gregory was determined upon the special verdict, by three judges; of whom, Sir. William Jones and Croke were two.

Sir William Jones reports, "That the second lease being void made an end of the question; and that the judges gave no opinion upon the other points."

The note in Croke [Cro. Jac. 502] does not say a word of the only ground of the judgment; but rather supposes the second lease good, by arguing, "That there being no increase of term, or diminution of rent, it had no semblance of benefit." Croke's note might be confounded with what passed upon the trial at bar: for Roll. states sayings to that effect upon the trial at bar. 1 Ro. Abr. 728, pl. 3.

But Sir William Jones is certainly right: for the second lease was void. And no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the new lease is absolutely void: for, the cause, ground, and condition of the surrender fails.

In Thompson v. Leach, 1 Ld. Ray. 315, (which was a most favourable case for the plaintiff,) much is said, in argument, "To prove the surrender of an infant or lunatic to be void;" to get rid of some doctrine laid down in Whittingham's Case, 8 Co. 43, H. 45 Eliz. "That the remainder-man, injured by the act, could not avoid it." But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man: neither claims under him whose act is in question; but both claim per formam doni.

In Palmer, 254, in Darcy v. Jackson (to the 3d point of that case), Dodderidge denies the doctrine; and says, "He in remainder, and the donor, shall take advantage of infancy:" which is agreeable to Littleton's reasoning § 635—it should seem against reason, that a feoffment made by an infant should grieve or hurt another, to take from them their entry, &c."

Suppose the comparison between an infant and a man non compos just, (which it is not,) the point of "The surrender being void or voidable" was not necessary to the judgment in that case.

I know of no judgment, upon the ground "That such a surrender is void." Most undoubtedly, the other party can not say so. If an infant was to surrender an unprofitable lease; and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed; the lessor never could say the surrender was void. There is no instance where the other party to a deed can object, on account of infancy. Consequently, the infant may let the surrender stand, or avoid it: which proves it to be voidable only.

If a new case should arise, where it would be more beneficial to the infant, "That the deed should be considered as void;" if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, unless it was deemed void;—the reason of the privilege would warrant an exception, in such case, to the general rule.

Powers of attorney are an exception to the general rule, as to deeds; and a power to receive seisin is an exception to that. The end of the privilege is "To protect infants." To that object, therefore, all the rules and their exceptions must be directed.

But be the point upon the solemnity of the delivery, as it may, (for there are respectable sayings the other way;) it is not necessary to our determination. For we are all of opinion, "That the 109*l.* received, and the other circumstances of the transaction, shew a semblance of benefit, sufficient to make it voidable only, upon the matter of the conveyance."

If it be voidable only, the second point is, "Whether the infant, by his entry before the assizes, (which appears to be during his minority,) has avoided it."

At the common law, the only conveyance in pais, of the freehold and inheritance of land, with transmutation of possession, was by feoffment. If it was tortious, the disseisee was obliged to enter, to revest his possessory title: and then he might bring an action of trespass. So, in the case of feoffments by an infant; he might enter during his minority, to revest his possessory right, for the sake of the profits; but still the feoffment was voidable only; and he might elect to confirm it, when he attained his full age.

The reason why an infant can not bring any writ analogous to a dum fuit infra ætatem, during his minority is, "That his election may not be bound by the judgment."

Whether an entry be of any use in the present case, is not material: it is sufficient, that it can not have any larger effect, than in the case of a feoffment. The infant is alive, still a minor. The defendant can not elect for him: he is a mere stranger, in every view; and has no estate affected by the conveyance.

We are all of opinion, "That the plaintiffs ought to recover." And it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs, here: for, finally, in another mode of proceeding, the conveyance must be confirmed; and the defendant would be to pay all the costs here and there.

It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, that justice, which must be the final determination of the question, may be done in the first stage of the litigation.

The consequence of what has been said, is, that

The Postea must be delivered to the plaintiffs.[19]

KEANE v. BOYCOTT.

(Court of Common Pleas, 1795. 2 H. Bl. 511.)

This was an action on the case for enticing the plaintiff's servant to leave his services.

The facts were, that a negro boy called Toney, a slave in the island of St. Vincent, about 16 or 17 years old, there executed an indenture, by which he bound himself to serve the plaintiff who was coming to Europe as a servant for five years, and the plaintiff covenanted to find him food, lodging, and clothing, and medical assistance in case of sickness. The plaintiff soon after arrived in this country with the boy as his servant, and went to Cheltenham, where the defendant, who was a captain in the army on a recruiting party, meeting the boy in the street with his livery on, asked him if he would enlist, to which he assented; the defendant then asked him whether he was an indented servant, to which he answered that he was bound to the plaintiff for five years. After this the boy went to the defendant's lodgings, where the defendant gave him two shillings, and told him to go to Gloucester to the regiment; to which place he accordingly went. Upon this, the plaintiff procured a warrant from a magistrate, under which the boy was taken and brought back to his service; after which, the defendant sent two serjeants to take the boy again, and bring him back to the regiment, which they did; but it did not appear that the boy went with them unwillingly or by compulsion.

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[19] In Holmes v. Rice, 45 Mich. 142, 7 N. W. 772 (1881), it was no defense to an action of trover that the plaintiff had obtained title and right to possession by a conveyance from an infant. Similarly, in Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101 (1818), and Hardy v. Waters, 38 Me. 450 (1853), it was no answer to the suit of an indorser upon a note against the maker that the plaintiff held the paper by endorsement from an infant. See, also, Hastings v. Dollarhide, 24 Cal. 195 (1864); Frazier v. Massey, 14 Ind. 382 (1860); Ward v. Steamboat Little Red, 8 Mo. 358 (1844).

On this evidence, the jury found a general verdict for the plaintiff. But a rule was obtained by Le Blanc, Serj. to shew cause why there should not be a new trial.[20]

Lord Chief Justice EYRE [declared that there was evidence of inducing the servant sufficient to go to the jury; that the contract of service, having possibly the effect to work an emancipation from slavery, was therefore of benefit to the infant, and so not void, but only voidable; that while the contract might be considered as one for necessaries, yet it was not necessary to go the whole length, yet it was unnecessary to take that position, as this was not a case between master and servant. He then discussed the distinction between contracts of infants which were void and those which were voidable, and then proceeded:]

Upon the distinction between those two species of contracts, we certainly are not warranted to decide, that a contract which may have the effect of emancipation, and which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it: and that is sufficient to decide this case. For this is the case of a stranger and a wrong-doer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts, a privilege which is personal to the infant, and which no one can exercise for him. Suppose the case of a stranger disseising the feoffee of an infant, the entry tolled, and a writ of right brought by the feoffee, should the tenant be permitted to object the infancy of the feoffor? In Whittingham's case, 8 Co. 42 [3 Com. Dig. 619, 8vo. See, also, 3 Burr. 1794, Zouch v. Parsons], it was holden, that a privity in law, not in blood or estate, did not entitle a third person to avoid the act of an infant. That was the case of an escheat, and several other cases are put in our books, where if the infant himself does not take advantage of infancy, no one else shall, and which are cases where the party who would take advantage of the infancy has a direct interest in the subject to which the act done by the infant has relation.

The defendant in this case, had no concern in the relation between the plaintiff and his servant, he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings would have been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial.

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[20] The statement abridged.

Rule discharged.

DE FRANCESCO v. BARNUM.

(Supreme Court of Judicature, 1890. L. R. 45 Ch. Div. 430.)

FRY, L. J.[21] * * * With regard to the first defendant, Mr. Barnum, the case stands in this way. It is alleged that he has enticed away the apprentices of Signor De Francesco; that he has done so with the knowledge of their engagement with Signor De Francesco, and consequently that what he did was in law malicious; and that he would be liable in damages for the malicious act. To that his defense is this, that the indentures of apprenticeship which were entered into between the infants and Signor De Francesco were not valid and binding in law, and that that being so the whole structure of the case against him fails. * * *

The most important question in this case is the first of those propositions which has been urged at the Bar on Mr. Barnum's behalf. Is there or is there not in this case a valid contract between the infants and Signor De Francesco? Now, from a very early date it has been held that one exception as to the incapacity of an infant to bind himself relates to a contract for his good teaching or instruction whereby he may profit himself afterwards, to use Lord Coke's language. There is another exception, which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour and you have a remuneration of wages, that contract, I think, must be taken to be, prima facie, binding upon an infant. At any rate, it is plain that the contract by which an infant binds himself to learn an art or trade to his own future profit is, prima facie, valid and binding. But no doubt the law has grafted on that general principle certain well-known and defined exceptions. It has been held from the time of Lord Coke, that an infant cannot bind himself to be liable to a penalty; that the contract to impose a penalty on an infant is void. Again, it has been held that a contract by which an infant renders his vested interest subject to forfeiture is void against the infant; and again, I think it may be taken that, wherever you find extraordinary or unusual stipulations contained in a contract, either of apprenticeship or of service, there the Court at least must

[21] Only parts of the opinion of Fry, L. J., are given.

be on the watch lest the infant should be held to be bound by a contract which is not reasonable and which is not good in law and which is not maintainable.

Now I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say, is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact.

[The court then, after an elaborate examination of the provisions of the contract, held the contract to be not for the benefit of the infant, saying: "Those are stipulations of an extraordinary and an unusual character which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation on the part of the master. I cannot, therefore, say that on the face of this instrument it appears to be one which the court ought to hold to be for the benefit of the infant." The court then concluded as follows:]

I hold, therefore, this instrument is one by which the infants are not bound; and consequently Mr. Barnum, having only enticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. Barnum. * * *

SECTION 7.—OBLIGATION OF ADULT UPON CONTRACT MADE WITH OR TRANSFER OF PROPERTY TO AN INFANT

HARRIS v. MUSGROVE.

(Supreme Court of Texas, 1883. 59 Tex. 401.)

Suit by infant to recover on the promissory note of an adult given to the plaintiff in payment for the sale by the infant of cattle to the defendant. There was judgment for the defendant.

DELANY, J., Com. App.[22] * * * The second [assignment of error] is that the court erred in the charge that where a contract is made with a minor, either party may disavow the contract when the minor attains his majority. In this we think the court erred. The rule of law is stated in 1 Parsons on Contracts, p. 329, as follows: "The disability of infancy is the personal privilege of the infant himself; and no one but himself or his legal representatives can take advantage of it. Therefore, other parties who contract with an infant are bound by it, although it be voidable by him. Were it otherwise, this disability might be of no advantage to him, but the reverse." * * *

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[22] Statement abridged and only so much of case as relates to a single point given.

Reversed and remanded.[23]

FLIGHT v. BOLLAND.

(High Court of Chancery. 1828. 4 Russ. 298.)

The bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the Court, that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order, that the plaintiff should be at liberty to amend his bill, by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

THE MASTER OF THE ROLLS. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

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[23] Accord: Voorhees v. Wait, 15 N. J. Law, 343 (1836); Chapman v. Duffy, 20 Colo. App. 471, 79 Pac. 746 (1905); Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134 (1816).

So an infant may take title by gift from an adult. Smith v. Smith, 7 Car. & P. 401 (1836). And may acquire title to real estate by the statute of limitations. Killebrew v. Mauldin, 145 Ala. 654, 39 South. 575 (1905).

Observe that the infant cannot hold the adult after the infant has elected to disaffirm. Edgerton v. Wolf, 6 Gray (Mass.) 453 (1856); Doe ex dem. Jackson v. Woodruffe, 7 U. C. Q. B. 332 (1851).

RILEY v. DILLON & PENNELL.

(Supreme Court of Alabama, 1906. 148 Ala. 283, 41 South. 768.)

Haralson, J. The action is in detinue, commenced on November 3, 1903, for the recovery of a mare.

In addition to the general issue, the defendant filed eight special pleas, the second, sixth and seventh of which set up in substance, that the defendant held title to the animal from one K. Y. Smith; that Smith, who was a minor, got the animal from plaintiffs, and executed to them his conditional sale-note for the sum of $80, and in and by said note the title to the said property was retained in the plaintiffs.

The eighth sets up the fact of Smith's minority, and that he gave the $80 note which represented the difference between the mare obtained from plaintiffs and a mule which said Smith let the plaintiffs have in part payment of the purchase price of the animal in question; which mule nor the proceeds thereof the plaintiffs have ever returned or offered to return to said Smith, but retain. The fifth sets up the same facts in substance as the eighth, and avers that the note was a conditional or "retained title" note,—the eighth setting up, that it was a mortgage. Both pleas set up that Smith was a minor at the time he executed the instrument.

Demurrers were interposed to these pleas and sustained.

The plaintiff introduced in evidence the instrument executed by said Smith, which is set out in the transcript. It is in form a promissory note, payable to the plaintiffs on the 20th of October next (1903). The obligation is referred to in the instrument itself as a note, and not as a mortgage. It contains the clause: "The title to remain in said Pennell & Dillon (the plaintiffs) until this note is fully paid." That this instrument purports on its face to be a conditional salenote, not varied by any fact introduced in evidence, cannot be well disputed.

A sale and delivery of personal property with an express stipulation that the title is to remain in the vendor until payment thereof, is a conditional sale. Sumner v. Woods, 67 Ala. 142, 42 Am. Rep. 104; Fields v. Williams, 91 Ala. 504, 8 South. 808. "If the condition of payment is not fully complied with, or is not waived, the original vendor's rights become perfect and absolute, and he may follow the property into whosoever's hands it is (except as provided by section 1017 of the Code of 1896), or recover its full value, and without any deduction for any partial payment made by the original vendee: at law they are all forfeited." Benjamin on Sales (American Notes, 7th Ed.) p. 301; Davis v. Millings, 141 Ala. 380, 37 South. 737.

The title to the animal never did pass into Smith, and hence, never could have passed into the defendant, and plaintiffs could have recovered either from Smith, if he had the property, or from Riley, if Smith transferred the property to him.[24] Disaffirmance, or putting any one in statu quo, is without any application here. The transaction is as though Smith had purchased the mare outright from plaintiffs, the title being retained by them until the $80 had been paid. Giving the mule by Smith to the plaintiffs in exchange of animals was nothing more nor less than a part payment of the purchase price, just as if the value of the mule had been paid in money, which the plaintiffs were under no obligation to refund in order to maintain the suit.

Infancy is a personal privilege, to be taken advantage of by the infant alone, and not by a stranger.[25] Interference by a stranger, wrongdoer, or person having no interest in the subject-matter, will not be tolerated or permitted and the privilege not being transferable cannot be exercised by assignees, or privies in estate. Sharp v. Robertson's Ex'rs, 76 Ala. 346; Hooper v. Payne, 94 Ala. 225, 10 South. 431.

There was no error in sustaining demurrers to the several pleas, nor in refusing the charges requested by defendant.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

O'ROURKE v. JOHN HANCOCK MUT. LIFE INS. CO.

(Supreme Court of Rhode Island, 1902. 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.)

Action on a policy of life insurance upon the life of the plaintiff's son. The defense is that the application by the son contained false answers to questions which were made warranties by the terms of the policy. One of the false answers claimed is that the applicant never had had rheumatism. The trial court was asked to charge that "if the boy did sign an application containing a materially untrue statement, the beneficiary is bound, and the policy is void." This was refused and there was a verdict for the plaintiff.

STINESS, C. J.[26] [after disposing of other matters, held that the infant is not bound by his warranties or representations as contracts, and that the beneficiary in the policy could take advantage of any defense on the part of the infant to their enforcement, thus concludes:]

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[24] Accord: Robinson v. Berry, 93 Me. 320, 45 Atl. 34 (1899).

[25] See Riggs v. Fisk, 64 Ind. 100 (1878), ante, p. 262.

[26] Statement abridged and part of opinion omitted.

Our conclusion is that during the minority of the applicant his warranties cannot be set up in defense to a suit upon the policy. But, even if this is so, the defendant argues that the beneficiary cannot recover, because, the policy being conditional upon the truth of the statements, she is estopped by false statements on the face of the contract. Undoubtedly this would be the rule in the case of a valid contract, because she could recover only on the terms of the contract. This contract purports to have been made with the minor. The beneficiary has made no statements of her own. If the warranties are not binding upon the minor, then, in legal effect, they are not a part of the contract, and the beneficiary is not estopped by them. This does not mean that a beneficiary may not be estopped by fraudulent conduct of her own; for example, if she had procured the insurance on this application with knowledge of the false statements. But we do not find that fact in this case. * * *

Motion for new trial denied.

WALKER v. DAVIS.

(Supreme Judicial Court of Massachusetts, 1854. 1 Gray, 506.)

Action of tort for the conversion of "one cow, the property of the plaintiff, of the value of twenty eight dollars."

At the trial in the court of common pleas, before Byington, J., there was evidence tending to show that on or about the 2d of February, 1852, the defendant went to the plaintiff's house, and proposed to buy a cow, and inquired the plaintiff's price, and the plaintiff asked $28, and the defendant offered $26; that the defendant remained with the plaintiff four or five hours, and plied the plaintiff with cider, drawn by him from the plaintiff's barrels, until he made the plaintiff drunk, and then took advantage of his incompetent condition, to trade for the cow; that the plaintiff said to a witness, who came into the room while the parties were together, that he had sold the cow for $26, and taken the defendant's note; that the defendant did in fact give the plaintiff his note for that amount, payable in sixty days, and drove away the cow; and that when the witness afterwards came into the room, "the plaintiff was on the floor, unable to get up, and without much sense of anything, and had the note in his hand."

It was also in evidence, and not controverted, that the plaintiff was eighty five years of age; that at the time of the trade he knew the defendant to be under twenty one years of age; but that the defendant at the same time represented that he was authorized to trade for himself, and that his father had given him his time; that the plaintiff, on two former occasions, had sold cows to the defendant, and trusted him, having the same knowledge; and that the defendant, at the time of the trial, was still under age.

There was also evidence of the following facts: After the note fell due, the plaintiff demanded payment thereof, which the defendant refused, assigning, as one reason, that he was a minor, and also saying that he had paid for the cow; that he never gave the note, and that, if the plaintiff had such a note, it was forgery. The plaintiff brought an action upon the note, in which the defendant prevailed on a plea of infancy. The plaintiff, immediately thereafter, demanded a return of the cow; and, the defendant not returning her, brought the present action. There was evidence tending to show that the defendant had sold the cow, and received the money for her, before the note fell due, and that he had not since had the possession or control of her.

Upon the facts conceded, and which the evidence tended to show, the defendant contended, and requested the judge to rule: "1st. That the plaintiff's treating the note as a valid contract, when in a condition of mind competent to judge of the circumstances under which it was given, and afterwards bringing suit upon it, were a conclusive ratification of the sale on his part. 2d. That bringing the action on the note was a waiver of the tort complained of. 3d. That as the original cause of action was grounded in contract, the plaintiff could not maintain tort, if the jury should find that, when the note fell due, and the demand was made for a return of the cow, the defendant had sold her and parted with the possession and control of her."

But the judge ruled against the defendant on all these points, and instructed the jury, "that if, upon the whole evidence in reference to the fraud, they should find the sale void for that cause, the plaintiff's treating the contract afterwards as a valid contract and the acts done by the plaintiff and defendant after such sale, as stated in the evidence, would not prevent the plaintiff from recovering, the defendant himself having prevented the plaintiff from enforcing payment of the note, by his successful defence to the action by his plea of infancy." The jury found for the plaintiff; and the defendant alleged exceptions.

THOMAS, J. The facts show clearly that on the day when the cow was taken, there was no valid contract between the parties. The defendant obtained the possession of her by fraud, a fraud to which infancy would constitute no defence. Supposing no contract to have been made, the plaintiff then had the election to bring his action for the tort, or, as the cow had been sold before the note became due, to waive the tort and bring assumpsit.

In this case, however, there was a voidable contract made. But the contract had this peculiarity. It might be avoided by either party; by the plaintiff on the ground of drunkenness, and by the defendant on the ground of infancy.

Ordinarily, in the case of torts, it is in the election of the owner of the property wrongfully taken, to bring his action for the tort, or, waiving that, to bring assumpsit, and when he brings the latter, the defendant is estopped to say there was no promise, and that he took the property wrongfully, or to set up his own fraud or wrong in defence of the suit.

In the case at bar, the contract needed a double affirmation to conclude the parties. The fraud or tort was merged in the contract, only when the contract had become complete. The plaintiff, by bringing his action upon the note, declared his willingness to affirm the contract. The defendant, on the other hand, still elected, as he had a right to do, to avoid the contract. This want of assent of the defendant is fatal, and the contract never becomes complete. The title to the cow did not pass. The tort was not waived.

If the defence to the action upon the contract had been one, which admitted its validity, and then sought to discharge it, as a discharge in insolvency of the defendant, payment, set off, or the statute of limitations, the judgment in the case would have concluded the parties. The contract being once complete, the plaintiff could not return to his remedy for the tort.

What was the effect of the new demand, it is not material to consider, as the facts show a conversion by the defendant before the demand was made, and the demand was therefore wholly unnecessary.

Exceptions overruled.[27]

ASHLOCK v. VIVELL.

(Appellate Court of Illinois, 1888. 29 Ill. App. 388.)

Conger, J. The declaration in this case consists of two counts. The first an ordinary count in trover for the value of a horse. The second setting forth in detail the sale of a horse worth $250 by appellant to appellee, who was a minor, the giving of a note therefor, the concealment by appellee of his minority, and of an intention not to pay for the horse, the sale and conversion of the horse to appellee's use, and his refusal to pay the note he had given. A demurrer was sustained to the second count. A plea of general issue was filed [to the first count], and also a second plea [to the first count], affirming that the plaintiff delivered the horse to the defendant under a contract of purchase, and in consideration of the delivery of the horse the defendant executed and delivered the promissory note described to the plaintiff; that defendant sold the horse, and at the time of making of the note and the sale of the horse the defendant was under twenty-one years of age, and that at the time the defendant arrived at the age of twenty-one years he did not have, and at no time since did he have, the possession of the horse or any part of the proceeds of the sale thereof.

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[27] So, in Mathews v. Cowan, 59 Ill. 341 (1871), a count in trover was sustained where the infant, after making a contract of purchasing chattels for cash, obtained the delivery of the same by making payment in checks which he knew to be worthless, and which were delivered to the seller with fraudulent purpose.

To this second plea a replication was filed, averring, in substance, that at the time of making the purchase the appellee did not intend to pay for said horse, and with such fraudulent intent upon his part not to pay for the horse, he, by such fraudulent means, procured the delivery to him of said horse, gave his note therefor with the fraudulent intent then formed not to pay said note, but defeat its payment by the plea of infancy, and that he took the horse to a foreign State, sold it and converted the proceeds to his own use; that he afterward refused to pay the note, whereupon appellant tendered him back his note and demanded his horse, etc.

To this replication a general demurrer was filed and sustained by the court, and upon the trial that followed all the instructions of appellant based upon the theory of his replication were refused, and a verdict and judgment for appellee followed.

Counsel for appellee cite a number of authorities upon the question of a minor falsely representing himself to be of full age, but we fail to see their application, except as authority to sustain the demurrer to the second count of the declaration, and as to the propriety of that ruling of the court we do not feel called upon to express an opinion.

The second replication is based entirely upon the alleged fraudulent intent existing in the mind of the appellee, at the time of the pretended purchase, of never paying for the property.

We are also referred by counsel for appellee to the following authorities as conclusive against the right of recovery in the present case:

Cooley on Torts, pp. 109, 110, says:

"There are some cases, however, in which an infant cannot be held liable as for a tort, though on the same state of facts a person of full age and legal capacity might be. The distinction is this: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly, by counting on the infant's neglect to perform it or omission of duty under it as a tort. The reason is obvious. To permit this to be done would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him." Id., pp. 106, 197.

Chancellor Kent says: "The fraudulent act, to charge him, must be wholly tortious, and a matter arising ex contractu, though infected with fraud, can not be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action." 2 Kent's Com. (10th Ed.) p. 277.

But this case as presented by the replication does not consist in a failure to perform a contract, but alleges that appellee became possessed of the horse by fraudulently going through the forms of a contract of purchase, when, in fact, no contract was ever made. In Farwell v. Hanchett, 120 Ill. 577, 11 N. E. 875, our Supreme Court, while holding that one purchasing goods with an intent not to pay for them gets no title, uses the following language: "The fraudulent vendee is not considered as a purchaser of the goods, but as a person who has tortiously got possession of them."

If an infant vendee obtains possession of goods through the pretense of a purchase, but intending at the time not to pay for them, there is, in fact, no contract executed between himself and his vendor. Their minds never meet. The transfer of possession as made by the vendor is based upon a supposed contract of sale, while such possession is received by the vendee fraudulently and tortiously. If the vendor knew the secret intentions of the vendee, he would no more surrender his property than he would to one seeking to take it from him by violence and without right. Hence, an action to recover damages for such a tort is not an attempt to enforce the contract indirectly by counting on the infant's refusal to perform it, for no contract existed; but a recovery is sought for the damages occasioned by the wrongful and fraudulent act of the infant.

Such a case is to be distinguished from one where an infant vendee, by virtue of an agreement, made at the time in good faith, to purchase and pay for goods, acquires their possession, and when sued for the purchase price pleads his infancy to defeat a recovery. In the latter case he has made a contract, which he may legally avoid if he desires; but in the former he neither made nor intended to make any contract, but obtained the possession of the property by fraud. Tyler on Infancy and Cov. p. 183, § 125; Rice v. Boyer, 108 Ind. 479, 9 N. E. 420, 58 Am. St. Rep. 53; Kellogg v. Turpie, 93 Ill. 266, 34 Am. Rep. 163.

We think the demurrer to the second replication should have been overruled.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.[28]

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[28] Accord: Wallace v. Morss, 5 Hill (N. Y.) 391 (1843), where the plaintiff had a count in trover as well as one for deceit; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. St. Rep. 53 (1886), where the pleading was under the Indiana Code. It seems to have been substantially a declaration in trover, the prayer being for the value of the property delivered to the infant.

A fortiori, where an infant obtains a lease by fraudulently misrepresenting his age, the adult may have a bill in equity to set aside the conveyance. Lempriere v. Lange, L. R. 12 Ch. Div. 677 (1879).

FITTS v. HALL.

(Supreme Court of Judicature of New Hampshire, 1838. 9 N. H. 441.)

See ante, p. 292, for a report of the case.

SLAYTON v. BARRY.

(Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510.)

See post, p. 321, for a report of the case.

CHAPTER III

INFANT'S LIABILITY FOR TORTS[1]

McCABE v. O'CONNOR et al.

(Supreme Court of New York, Appellate Division, 1896. 4 App. Div. 354, 38 N. Y. Supp. 572.)

MERWIN, J.[2] * * * The appellants are four in number, three of whom are now infants and the other one was an infant at the time of the injuries complained of.

It is found by the referee as matter of fact: That on the 15th day of September, 1890, John O'Connor, their father, was appointed general guardian of their persons and property, and duly qualified and immediately entered upon his duties as such, and has so continued as to those not of age up to the present time. "That all of said infants lived with their father and general guardian on the premises mentioned in plaintiff's complaint, on which the wall in question was erected at the time said wall fell, and for several years previous thereto.

"Third. That during the year 1891, and for several years previous, defendant John H. Malone lived on said premises mentioned in said complaint, occupied by the infant defendants.

"Fourth. That during the year 1890 and for some time prior thereto, the plaintiff owned the premises described in the complaint, situated on the east side of Congress street, in the Fifth Ward of the city of Troy, N. Y.

"Fifth. That at the time and for more than three years prior to the commencement of this action the defendants were the owners of a stone wall and the premises on which it stood, to wit, lots Nos. 186, 187, 188, 189 and 192, adjoining plaintiff's property on the east, as described in the complaint.

"Sixth. That on the 25th day of March, 1891, said wall fell on plaintiff's property.

"Seventh. That said wall was defective and fell through the carelessness and negligence of the defendants.

"Eighth. That about five months before said wall fell the defendant John H. Malone was notified personally of its defect.

"Ninth. That by reason of defendants' negligence and the falling of the wall as aforesaid plaintiff was damaged to the amount of two hundred dollars."

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[1] See "Responsibility for Tortious Acts," by Prof. John H. Wigmore, 7 Law Rev. 441, 447, 448.

For liability of intoxicated persons for torts, see Reed v. Harper, 25 Iowa, 87, 95 Am. Dec. 774 (1868).

[2] Part of opinion omitted.

As matter of law the referee found that the plaintiff was entitled to judgment against the defendants for damages in the sum of $200 with interest from the commencement of the action and costs.

The claim of the appellants is that, as they were infants and had a general guardian at the time of the injury, they are not chargeable with negligence, and are not responsible for the injury.

In 2 Kent's Commentaries, 241, it is said: "Infants are liable in actions arising ex delicto, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds."

In Cooley on Torts (2d Ed.) 122, it is said: "An infant as the owner or occupant of lands is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor. Here, also, the intent is immaterial. The wrong consists in the fact that enjoyment of one's own property or rights is diminished or destroyed by an improper use or unreasonable use or misuse of the property of another."

Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, was an action in tort for personal injuries occasioned to the plaintiff by the defective condition of a building owned by the defendant, who was a lunatic, and of whom a guardian had been appointed, who, at the time of the injury, had the care and management of all her property. It was held that the defendant was liable, and it was said: "This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which the lunatic himself, and not his guardian, is the owner. Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587, 591. The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him. Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Bartlett v. Boston Gaslight Co., 117 Mass. 533, 19 Am. Rep. 421. And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities of ownership of real estate." The same doctrine is asserted in 16 American and English Encyclopedia of Law, 409. This doctrine would apply as well to infants as to lunatics.

The general rule is that a person must so use his property as not to injure that of his neighbor. Moak's Underhill on Torts, 229. In Vincett v. Cook, 4 Hun, 318, it was held that failure on the part of the owner of a building to keep it in a safe condition and resulting damages throw upon the owner the burden of showing that the building was safe so far as diligent examination would show. The same view was taken in Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. These cases related to the walls of a building, but there is no good reason apparent why the principle should not apply to a case like the present where the wall was entirely on defendant's land and was about twenty feet high, as appears from the complaint and answer. Nor is it clear that an owner in such a situation should be relieved of liability by saying that he is an infant and has a general guardian whose duty it was to keep the premises safe, but failed to do his duty.

Negligence is found here as a matter of fact. What the proofs were we cannot say, as the evidence is not here. It may have been shown that negligence was based on their personal acts. It was found that they occupied the property. If occupants, clearly they might under proper proofs, be charged with negligence. 2 Addison on Torts, 1126; Schouler's Dom. Rel. (2d Ed.) 564. We cannot reverse if in any view of the facts found the judgment was proper.

But it is said that no notice to the appellants was found. If there was no failure of duty until notice, then the finding of negligence presupposes the existence of such notice or knowledge as would be requisite to call upon the owner to act, and involves a finding to that effect. Notice is found to a co-tenant in occupation. If the infants were to be deemed occupiers, it would not follow as a matter of course that they would be entitled to notice.

The appellants have not, I think, shown that in any view of the facts found the judgment was not proper. It should, therefore, be affirmed.

PARKER, P. J., and LANDON, J., concurred. PUTNAM and HERRICK, JJ., dissented.

HERRICK, J. (dissenting). I am unable to concur in the opinion of Justice MERWIN in this case. Negligence is a violation of or omission to perform some duty. There can be no duty unless there is a power to fulfill it.

The guardian has absolute control of the lands and property of his ward. By statute it is the duty of the guardian not to "make or suffer any waste, sale or destruction of such things or of such inheritance, but [he] shall keep up and sustain the houses, gardens and other appurtenances to the lands of his ward by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his hands." 2 Rev. St. 153, § 20 (Birdseye Ed. p. 1292, § 44); 2 Kent's Comm. 228. The guardian can lease the land of his ward until he attains the age of twenty-one years, and may maintain an action of trespass or ejectment. Thacker v. Henderson, 63 Barb. 271. The guardian having entire control of their property, the infants in this case were not in a position to either remove the wall in question or to repair and maintain it in a safe condition.

Again, negligence is actual or implied. There can be no actual or personal negligence charged on the part of the infant defendants, because they had no legal or actual control over the property in question. The negligence of their guardian cannot be implied or imputed to them as in the case where the principal is held responsible for the acts of an agent or the employer for the negligence of his employés; that proceeds upon the theory that the superior is responsible for the action of the inferior.

In the case of guardian and ward, the superior authority is that of the guardian, and the negligence of the superior is that of the guardian, and the negligence of the superior cannot be implied or attributed to the inferior. The ward does not direct or control the guardian, but the guardian the ward. In the absence of any finding of actual or personal negligence on the part of the infants, I do not think the judgment of negligence can be sustained against them. The case of Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, does not seem to me entirely a parallel one. The interest of a committee of a lunatic in the property of the latter is different from that of a guardian in the estate of a ward. A committee of a lunatic is held to be a mere bailiff or agent to take care of and administer the property of the lunatic (Matter of Strasburger, 132 N. Y. 128, 30 N. E. 379; People ex rel. Smith v. Commissioners of Taxes, 100 N. Y. 215, 3 N. E. 85); while, as we have seen, a guardian has the possession, custody and control of his ward's land.

Judgment affirmed, with costs.[3]

SLAYTON v. BARRY.

(Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510.)

Tort, for deceit and for conversion. Trial in the Superior Court, before Blodgett, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion, and in the following note by the reporter:

"The plaintiff requested the judge to instruct the jury: (1) That if the defendant, a minor, for the purpose of defrauding the plaintiff and inducing him to sell and deliver goods to the defendant falsely represented that he was of full age, and the plaintiff, relying on such representation, was thereby induced to sell and deliver goods to the defendant, who subsequently repudiates his purchase and refused to pay for the goods for the reason that he was a minor, he is liable in damages. (2) That if the defendant, a minor, purchased goods of the plaintiff, obtained possession of them, converted them to his own use, and subsequently repudiated the purchase and refused to pay for the goods for the reason that he was a minor, the plaintiff at the time of the purchase having no knowledge of the defendant's minority, the effect of the avoidance by the defendant of his contract was to make it void from the beginning, and to render him liable in damages for the conversion of the goods."

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[3] Similarly, in trespass q. c. f.: (a) The extreme youth of the defendant is no defense. Huchting v. Engel, 17 Wis. 230, 84 Am. Dec. 741 (1863), child six years old. (b) The fact that the child acted under the authority or by the direction of its father is no defense. Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457 (1859).

But where an essential element of the tort is the intent of the defendant, or a discretion which must exist before he can be guilty of negligence, the age of the defendant at the time of the tort complained of becomes material, in determining whether the tort has been committed.

MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age and thereby induced the plaintiff to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. Merriam v. Cunningham, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; Grove v. Nevill, 1 Keb. 778; Jennings v. Rundall, 8 Term R. 335; Green v. Greenbank, 2 Marsh. 485; Price v. Hewett, 8 Exch. 146; Wright v. Leonard, 11 C. B. (N. S.) 258; De Roo v. Foster, 12 C. B. (N. S.) 272; Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; Ferguson v. Bobo, 54 Miss. 121; Brown v. Dunham, 1 Root (Conn.) 272; Geer v. Hovy, 1 Root (Conn.) 179; Wilt v. Welsh, 6 Watts (Pa.) 9; Burns v. Hill, 19 Ga. 22; Kilgore v. Jordan, 17 Tex. 341; Benjamin, Sales (6th Ed.) § 23; Cooley, Torts (2d Ed.) 126; Add. Torts (Wood's Ed.) § 1314. See contra, Fitts v. Hall, 9 N. H. 441; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Wallace v. Morss, 5 Hill (N. Y.) 391.

The general rule is, of course, that infants are liable for their torts. Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. 492; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be as stated in Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract * * * and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent, Comm. (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant] must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition it would be better if the rule were as laid down in Fitts v. Hall, supra, and Hall v. Butterfield, supra, in New Hampshire, and Rice v. Boyer, ubi supra, in Indiana, we need not consider. The plaintiff relies on Homer v. Thwing, 3 Pick. 492, Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, and Walker v. Davis, 1 Gray, 506. In Walker v. Davis, supra, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore clearly, as a conversion. Badger v. Phinney, supra, was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In Homer v. Thwing, supra, the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled. So ordered.[4]

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[4] Accord: Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953, 114 Am. St. Rep. 594 (1906), count only in tort for deceit.

Where the principal case is followed, a fortiori the infant is not liable in deceit for the false warranty of property sold. Green v. Greenbank, 2 Marsh, 485, 4 E. C. L. 375 (1816); West v. Moore, 14 Vt. 447, 39 Am. Dec. 235 (1842); Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659 (1865); Doran v. Smith, 49 Vt. 353 (1877).

Even, however, in New Hampshire, the same ruling occurs. Prescott v. Norris, 32 N. H. 101 (1855). The court notices Fitts v. Hall, 9 N. H. 441 (1838), post, p. 324, but follows Green v. Greenbank, supra.

Vance v. Ward, 1 Nott & McC. (S. C.) 197, 9 Am. Dec. 683 (1818), it is believed, stands alone in holding the infant liable in deceit for a false warranty of the property sold.

FITTS v. HALL.

(Superior Court of Judicature of New Hampshire, 1838. 9 N. H. 441.)

The plaintiff was induced to sell hats to the defendant by reason of the latter's false and fraudulent representations that he was of full age. The defendant gave to the plaintiff a note for the price. The plaintiff sued the defendant upon this note. The defendant pleaded infancy and recovered judgment and costs. This action was then brought. There were two counts, one in case for deceit and the other for trover. The court instructed the jury that the action was sustainable in point of law. Verdict for the plaintiff. Motion to set aside verdict and enter non-suit.

Parker, C. J. [held, first, that there was no cause of action in a count for trover. This part of the opinion is given ante, pp. 292, 317. The court then proceeded to consider whether the count in deceit stated a cause of action. This part of the opinion is as follows:]

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. 3 Pick. (Mass.) 33, 36, Livermore v. Herschell.

But Johnson v. Pie, 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100., and so he had cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. "Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses. Dyer, 105. And so, if he cheat with false dice, &c." The report in Levinz states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested.

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the Case for Deceit," but lays down the rule that, "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage."

he is liable for the deceit; for which he cites, 1 Sid. 183. Com. Dig. Action &c., A, 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds, (2 Kent, 197,) as for slander, (Noy's Rep. 129, Hodsman v. Grissel,) and goods converted, (auth. ante,) there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of Johnson v. Pie, Grove & Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove & Nevill's case the subject matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, assumpsit might have been maintained. The infant was not to be charged, by adopting a different form of action. But the representation in Johnson v. Pie, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely ex delicto. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract.

It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed.

In Bac. Abr., Infancy, I, 3, it is said—"Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract of agreement, with an intent afterwards to elude it by reason of his privilege of infancy that a court of equity will deem it good against him according to the circumstances of the fraud." 3 Gwillim's Bac. 604. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition that an infant may be bound, in equity, by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. 2 Ves. Sr. 212, Lord Teynham v. Webb; 2 Eq. Cas. Abr. 489, Evroy v. Nicholas, and case cited; 1 Brown's Ch. Rep. 358, Beckett v. Cordley; Fonblanque's Eq. (4 Am. Ed.) 80, note z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105, Conroe v. Birdsall. If, in equity, the infant may be bound by the contract, because of his fraud in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and a

New trial granted.[5]

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[5] See, also, Mathews v. Cowan, 59 Ill. 341 (1871), where a count in deceit founded upon the false and fraudulent conduct of the infant, after obtaining a contract of sale for cash in securing delivery by means of worthless checks, was sustained.

In Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53 (1886), the plaintiff filed a complaint under the Code against the defendant for falsely and fraudulently representing himself to be of age and thereby inducing the plaintiff to sell the defendant certain chattels. To this complaint a demurrer was sustained by the court below, and the judgment was reversed with instructions to overrule the demurrer. In the course of his opinion, Elliott, C. J., said:

"The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. Ex parte Unity, etc., Ass'n [3 De Gex & J. 63] supra, and authorities cited. Under our system we can recognize no such distinction, a distinction which is, as we think, a shadowy one under any system, for in our system the rules of law and equity are merged and mingled. Under such a system as ours courts should pursue such a course as will render justice to suitors under the rules of equity, which after all, are but the embodiment of the principles of natural justice. It cannot be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form, for under our system courts must render such judgments as yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their

YOUNG v. MUHLING.

(Supreme Court, Appellate Division, Second Department, 1900. 48 App. Div. 617, 63 N. Y. Supp. 181.)

WILLARD BARTLETT, J. At the time of the transactions involved in this suit the defendant was a minor. About the middle of June, 1898, he went to the plaintiff's livery stable at Spring Valley, in Rockland county, and ordered a team with which to go to Haverstraw on the third of July following. He told the plaintiff's agent in charge of the stable that he wanted to drive to Haverstraw and "cut a swell" there, and the agent swore that he let him the horses for that purpose. The arrangement was that the team should be delivered at the defendant's house in the village of Monsey, on July 3, 1898, at half past 12 o'clock in the afternoon. The team was brought to the defendant's residence at Monsey at the time specified by the plaintiff's agent, who then asked the defendant where he intended driving. According to the testimony of this witness, the defendant responded: "I am going direct to Haverstraw, put the team in, have them fed and cared for, and return home in the evening." The witness responded: "You need not hurry to get home; if you are detained by your friends longer than you expect, come home at 10 o'clock, and later if necessary, but don't injure the team." Accompanied by a friend the defendant drove the team to Haverstraw, by way of Nanuet and the Short Clove, which is a somewhat longer route than another road which he might have taken. The day was extremely hot, and on the way homeward in the evening one of the horses was overcome and died from the effects of what we must assume to have been heat and over-exertion. This action is brought to recover damages against the defendant for a malicious abuse of the plaintiff's team, resulting in the death of one of the horses and injury to the other. The complaint also alleges that the defendant drove said team not only to Haverstraw, but to divers other and more distant places in and about the county of Rockland. The answer contains a denial of the material allegations of the complaint, except those which relate to the hiring of the team, and also sets up a plea of infancy.

Although the complaint alleges and the answer admits that the contract of hiring was entered into on or about the 2d day of July, 1898, the testimony on both sides shows that a complete agreement in respect to the letting of the team was made about two weeks earlier.

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aid is at law or in equity, but they will render justice to those who ask it in the method prescribed by our Code of Civil Procedure."

See, also, Campbell v. Ridgeley, 13 Victoria Law Rep. 701 (1887); Eckstein v. Frank, 1 Daly (N. Y.) 334 (1863).

It has been held, however, in New York that the infant is not liable in deceit for the false warranty of the property sold by him. Hewitt v. Warren, 10 Hun, 560 (1877).

That agreement did not bind the defendant to drive to Haverstraw by the shortest route. It left him at liberty to pursue any usually traveled road which people were accustomed to take who desired to go from Monsey to Haverstraw. The voluntary statement on his part, when the team was brought to his residence on the third of July, that he proposed to go direct to Haverstraw, did not, under the circumstances, in my opinion, become a binding part of the contract of hiring; but, if I am wrong in this, I am nevertheless of opinion that the use of the word "direct" did not necessarily imply an engagement to go by the very shortest way. It should be regarded as signifying merely the defendant's intention to proceed by some usual and expeditious route, without diverging from it. In this view, it becomes immaterial whether the contract was to drive direct to Haverstraw, or merely to drive to Haverstraw. In neither aspect of the case does the evidence establish any substantial departure from the terms of the contract. The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort, merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract. This qualification of the doctrine was recognized by the learned trial judge, who properly charged the jury that there must be a substantial and material departure from the contract of hiring in order to render his plea of infancy unavailable to the defendant.

But in my opinion the defendant was entitled to a dismissal at the close of the evidence on both sides, and the case should not have been submitted to the jury at all. The rule applicable to the case cannot be better stated than it is in the language of Chancellor Kent in Campbell v. Stakes, 2 Wend. 137, 19 Am. Dec. 561, where he says: "The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either would not subject him or an adult to an action of trespass, the contract remaining in full force. But if the infant does any willful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort." See, also, Moore v. Eastman, 1 Hun, 578, and cases there cited.

It is essential, to hold an infant for trespass in a suit like this, to show that the injury to the horse was willful and intentional. A mere lack of moderation in driving and a failure to observe due care, where there is no willful and intentional injury, will not suffice to render an infant liable. As Chief Justice Cooley says: "If case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment." Cooley, Torts (2d Ed.) 123.

There is no evidence in the present case sufficient to warrant a finding that the injuries which the plaintiff's team sustained were intentionally inflicted by the defendant. On the contrary, it is tolerably plain that the death of one of the horses and the sickness of the other were simply due to the fact that they were driven a long distance during the hottest portion of an exceptionally hot day in midsummer. The only testimony tending to show that there had been a material departure from the terms of the contract by driving to Nyack instead of to Haverstraw was furnished by the alleged admission of the defendant to that effect, immediately after the death of the plaintiff's horse. This admission, however, was fully explained by the defendant, who said that he was frightened and excited at the time of the accident, and might have said to the plaintiff's representative at the livery stable that he went to Nyack instead of Haverstraw, but that if he did so he meant New City and not Nyack. This statement, taken in connection with his own positive denial and that of his friend, and the proof on both sides that they had been to Haverstraw and spent the afternoon there, did not leave more than a scintilla of evidence in the case to show that the team had been driven to Nyack. Upon this record no verdict based on a finding that the defendant drove to Nyack instead of Haverstraw could be sustained for a moment.

I think it is clear that whatever liability can be predicated upon the defendant's management of the plaintiff's team arises out of contract, instead of tort, and to this liability his infancy constituted a complete defense.

I am, therefore, in favor of reversing the judgment. All concurred, except HIRSCHBERG, J., absent.

Judgment and order reversed and new trial granted, costs to abide the event.[6]

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[6] Accord: Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189 (1870). But, see Jennings v. Rundall, 8 Term R. (Durn. & East) 335 (1799).

In Caswell v. Parker, 96 Me. 39, 51 Atl. 238 (1901), the plaintiff intrusted the defendant, an infant, with shoes to sell on commission, they to remain the property of the plaintiff until sold. The defendant sold some of the shoes on credit, in disobedience of orders, and failed to account therefor, but acted in good faith in so doing. Held, he was not deprived of the benefit of his plea of infancy by reason of the action against him being brought in tort, instead of an action of assumpsit for breach of contract.

FREEMAN v. BOLAND.

(Supreme Court of Rhode Island, 1882. 14 R. I. 39, 51 Am. Rep. 340.)

Durfee, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defence to an action ex delicto for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it; the bailment being thus determined.

The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. Homer v. Thwing, 3 Pick. (Mass.) 492; Towne et al. v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Fish v. Ferris, 5 Duer (N. Y.) 49; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Addison on Torts, § 1314.

We understand that the defendant does not ask us to decide the questions raised by the other exceptions, the exceptions being waived.

Exceptions overruled.[7]

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[7] Accord: Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64 (1899); Burnard v. Haggis, 14 Com. Bench (N. S.) 45 (1863). Contra: Wilt v. Welsh, 6 Watts (Pa.) 9 (1837).

In Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189 (1870), Bellows, C. J., at page 240, said: "Between acts that are to be regarded as mere breaches of the contract of bailment, and positive and willful torts, a line must be drawn somewhere; and although it must often be difficult to discriminate between them, we think it is safe to hold that the acts we have named and others of a like character, are positive torts for which an infant is liable, and not mere breaches of contract. When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails for want of skill and experience and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. A failure in such a case, from mere want of ordinary care or skill, might well be regarded as in substance a breach of contract for which the infant is not liable, even although in ordinary cases an action ex delicto might be sustained. But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in the case of an adult, or a promise to return the thing safely."

In Cole v. Manners, 76 Neb. 454, 107 N. W. 777 (1906), it was held that the mere fact that an infant tenant had covenanted to permit the landlord to culti-

LOWERY v. CATE.

(Supreme Court of Tennessee, 1901. 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744.)

McALISTER, J. The plaintiff below recovered a verdict and judgment for the sum of $310.00 against the defendant, Lowery, for the value of wheat and other property alleged to have been destroyed through his negligence.

It appears from the proof that the defendant, Lowery, was the owner of an engine and thresher, and entered into a contract with plaintiffs to thresh their wheat for every twentieth bushel. The contract was made by J. G. Cate, for himself and other parties in interest, with the defendant, Lowery. The wheat was stored in a large shed on Cate's farm, the portion of each of the parties being packed in separate tiers. The defendant, Lowery, with his employés, arrived with the thresher early in the morning and began threshing the wheat. They continued threshing until about 1 o'clock in the afternoon, when the wheat caught fire from the sparks emitted from the engine, and both the wheat and oats stored in the shed, together with the shed, were totally destroyed.

There is proof tending to show the value of the wheat was $730.00, the oats $75.00, and the shed $125.00.

Separate suits were brought by the parties in interest against the defendant before a Justice of the Peace of Polk County. In the Circuit Court, by consent of parties, these causes were heard together, and verdict rendered in favor of the plaintiffs for sums aggregating $310.00.

There is proof tending to show that the defendant proceeded to thresh the wheat without any spark arrester on his engine, and that on the day preceding defendant had set fire to the wheat of one Howard while threshing it. There is also proof tending to show that the engine and thresher were set in such position and at such an angle that the wind blew the sparks directly towards the shed. It is also shown that the wind was not blowing very hard in the morning, but during the day its velocity greatly increased, and plaintiff, seeing there was danger of the wheat catching fire, warned defendant's engineer, but the engineer said there was no danger; that he would turn on an exhaust valve and stop the sparks. Plaintiff admits he saw there was no spark arrester on the engine, but says he thought that was all right. Plaintiff states that when he called his men to set the engine square, the work was commenced, and defendant said the angle set was all right. It was 74 feet from the point the fire caught to the engine. It would

vate and harvest crops did not prevent the landlord from obtaining an injunction to prohibit actions by the infant tenant which would cause irreparable damage and were in violation of that covenant.

have been 20 feet further if a square set had been made. Plaintiff states, on cross-examination that he did not stop them from making the angle set, nor did he stop them from running when he saw the danger, for the reason the engineer told him there was no danger, and that he could stop the sparks by turning on the exhaust valve.

There is no proof indicating any willfulness on the part of defendant or his employés in setting fire to the shed, but the case presented by plaintiff is one of negligence in the operation of the engine and thresher.

At the time the contract was made and the wheat destroyed, the defendant, Lowery, was a minor 18 years of age. Plaintiff Cate testified that he said to defendant, when he commenced the work, that he seemed rather young to be running a thresher. Defendant replied that he did not know much about it, but had men with him as employés who did understand it. On the trial below, the defendant pleaded his infancy in bar of the action. Plaintiff's counsel demurred to the plea on the ground that the action was founded upon tort, and not upon contract, and an infant is liable in law for his torts. The Court sustained the demurrer and the plea was stricken from the file. Counsel for defendant also submitted a supplemental request, asking the Court to charge that if the loss resulted from a negligent performance of the contract, and there was no willful or intentional wrong, defendant would not be liable. This request was refused. The action of the Court on the plea and refusal to charge, as requested, is made the basis of the third assignment of error, and raises the determinative question in the case.

We are of opinion the Court was in error in sustaining the demurrer. The principle is well settled that an infant is liable in an action ex delicto, for all injuries to persons or property committed by him. Dial v. Wood, 9 Baxt. 296; Beasley v. State, 2 Yerg. 481; Weigand v. Malatesta, 6 Cold. 367.

"But while an infant is liable for his torts, he is not liable for the tortious consequences of his breaches of contract, and, though the action may be in form as for a tort, yet if the subject of it be based on contract, the suit will be attended with all the incidents of an action ex contractu. Again, the mere fact that the cause of action grows out of or is connected with contract, will not in every case shield the infant from liability. If the tort is subsequent to or independent of the contract, and not a mere breach of it, but is a distinct, willful and positive wrong in itself, then, notwithstanding the contract, the infant is liable. This principle is illustrated in the use of hired horses. If an infant hires a horse to be moderately driven, or ridden, and the infant, from lack of experience, rides or drives the horse immoderately, or injures him by unskillful management, it is a mere breach of contract, and the plea of infancy is a complete defense to an action therefor. But if the infant willfully and intentionally injures the animal, or uses him for a different purpose for which he was hired, or drives him elsewhere or beyond the place contemplated in the contract, it is a conversion of the animal, which terminates the contract and renders the infant liable in trover for its value." 16 Am. & Eng. Ency. Law (2d Ed.) 309.

"The defense of infancy cannot be pleaded in actions for wrongs independent of contract, but it may be pleaded in all cases, where the cause of action is substantially founded on a contract, though the declaration might be framed in form of tort, instead of a contract. So that the plaintiff cannot indirectly make the defendant liable on a contract made during infancy by merely changing the form of the declaration." Keener's Selections on Contracts, vol. 1, p. 513.

Mr. Cooley, in his work on Torts (page 103), says: "However, there is an exception to the rule. The distinction is this, if the wrong grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the adult to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort. The reason is obvious. To permit this to be done would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him. If suit should be brought against an infant for the immoderate use of and want of care of a horse, which has been bailed to him, infancy is a good defense, the gravamen being a breach of contract of bailment. So infancy is a defense to an action by a shipowner against his supercargo for a breach of his instructions regarding the sale of the cargo, whereby the same was lost or destroyed."

Parsons, Contracts, on page 316, says: "An infant is protected against his contracts, but not against his frauds or other torts. If such tort or fraud consist in the breach of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of action, which the law does not permit."

In the case of Fitts v. Hall, 9 N. H. 441, the Court says that no liability growing out of a contract can be asserted against an infant. The test of an action against an infant is whether a liability can be made out without taking notice of the contract.

Now, applying the test laid down in the cases cited, it will be observed that the tort, which is the foundation of the present action, was committed in the performance of a contract, and is not a willful or intentional wrong, done independent of and outside of the contract.

The claim of plaintiff is that defendant was guilty of negligence in failing to have reasonably safe and suitable machinery, in that it had no spark arrester, and that the defendant and his employés were negligent in the locating of the engine and thresher at an angle and in such proximity to the wheat shed. The gravamen of the action is that this negligence constituted a breach of the contract and furnished ground of liability.

Plaintiffs are bound, in making out this case, to show the contract, and the ground of liability is the negligent performance of that contract, whereby injury has resulted. There is no claim of willful injury. Plaintiff must have known at the time this contract was made that defendant was an infant under twenty-one years, since he admits he told defendant, he, defendant, seemed to be rather young to run a thresher. He cannot now complain that his contract was in law a voidable one, and that it imposed no liability upon the defendant for its negligent performance.

For the error in sustaining the demurrer to the plea, and in refusing the supplemental request, the judgment is reversed and the cause remanded.

CHAPTER IV

INFANT'S RESPONSIBILITY FOR CRIMES[1]

STATE v. YEARGAN.

(Supreme Court of North Carolina, 1895. 117 N. C. 706, 23 S. E. 153, 30 L. R. A. 196.)

Indictment for gambling, tried at Fall Term, 1895, of Wake Superior Court, before Coble, J., and a jury. The jury rendered a special verdict as follows:

"Defendant was bound over by the mayor of Raleigh for playing at a game of chance, and was indicted at September Term, 1895, for playing at a game of chance and betting money thereat, the particular game being known as 'shooting craps.' Defendant did play at said game of chance of shooting craps, and did bet money thereat, and that said game was played by throwing ordinary square dice with numbers on each square. Defendant was 13 years old on the 6th of June, 1895, and did not know he was violating the law when he played at said game and bet money thereat. That as to other offenses, such as assault and battery and stealing the defendant knew that to commit them was to violate the law; that he already knew the difference between right and wrong. If, upon these facts, the court be of opinion that the defendant is not guilty, the jury find that he is not guilty; if otherwise, the jury find that he is guilty."

The court being of opinion that defendant was not guilty, gave judgment discharging him, and the State appealed.

Faircloth, C. J. The defendant is indicted for playing and betting money at a game of chance, called "shooting craps," by throwing dice with numbers. The jury rendered a special verdict and say that he did play and bet at such game. They also say he is over 13 and under 14 years of age; that he did not know he was violating any law, and that "he clearly knew the difference between right and wrong." His Honor held that defendant was not guilty and the State appealed.

An infant under 7 years of age cannot be indicted and punished for any offense because of the irrebuttable presumption that he is doli incapax.[2] After 14 years of age he is equally liable to be punished for crime as one of full age. His innocence cannot be presumed. Between 7 and 14 years of age an infant is presumed to be innocent and incapable of committing crime, but that presumption in certain cases may be rebutted, if it appears to the court and jury that he is capable of discerning between good and evil and in such cases he may be punished. The cases in which such presumption may be rebutted and the accused punished when under 14 years, are such as an aggravated battery, as in maim, or the use of a deadly weapon, or in numbers amounting to a riot; or a brutal passion, such as unbridled lust, as in an attempt to commit rape, and the like. In such cases, if the defendant be found doli capax, public justice demands that the majesty of the law be vindicated and the offender punished publicly although he be under 14 years of age, for malice and wickedness supply the want of age. Our case presents the question of a simple misdemeanor by one who, the jury say, knew right from wrong, but did not know he was violating any law, and presumably had no intention of committing any offense. Among persons of full age ignorance of the law is no excuse, nor is the absence of any intent to violate it available as a defense, but it is the intent to do an act which is a violation of law that makes the actor guilty. In our examination of the early criminal law books, such as Blackstone, Russell, Hale and Wharton, we have been unable to find an instance in which, for a simple misdemeanor unattended with aggravating circumstances such as the above, an infant under 14 years has been indicted and punished. All the cases treated by those writers are felonies. The question it seems has not heretofore been presented to this Court and the professional opinion has been that in all cases when capacity to distinguish right from wrong has been made to appear, the defendant may be punished although under 14 years of age.

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[1] For the effect of insanity and intoxication as a defense to crimes, see cases on the Criminal Law, this series, pp. 145, 169.

[2] Accord: Marsh v. Loader, 14 C. B. (N. S.) 535 (1863).

In State v. Pugh, 52 N. C. 61, the question was not directly presented, but was appropriately referred to by the Court when Pearson, J., stated that "the wisdom of the common law is illustrated in the rule that for an ordinary assault and battery a boy under the age of 14 is not liable to indictment * * * and it is better to leave such matters to the correction which the parent or schoolmaster may in their discretion inflict, than to give importance to it by a public trial before a Court and jury." In Reg. v. Owen, 4 Car. & P. 236, the defendant (ten years) was indicted for larceny and Littledale, J., told the jury that "the defendant ought not to be convicted unless the evidence satisfies you that at the time of the act she had a guilty knowledge that she was doing wrong and that the evidence should be strong and pregnant."[8] We think it better to adopt that rule of the common law with the limitations above indicated.

No Error.

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[8] The burden of proving that an infant under 14 and over 7 has the state of mind which supplies the place of age in producing evidence of the criminal intent is upon the state. State v. Tice, 90 Mo. 112, 2 S. W. 269 (1886).

PART III

HUSBAND AND WIFE

[During the last sixty years the law of husband and wife has gone through an evolution which has eliminated a great deal of what was once highly important. In the first half of the nineteenth century the law of husband and wife, especially with reference to the property rights of the wife, consisted of certain rules which were acted upon by the common-law courts and others which were administered by the courts of chancery. About the middle of the nineteenth century many states in this country, by statutes following the lines laid out by the courts of chancery, modified the rules applied in the courts of law. These statutes were on their face of partial effect only, and many nice and difficult questions as to their indirect effect were raised. Most states at a perceptibly later time passed complete reform legislation, in which most of the old law was entirely swept away. It will thus be observed that several topics of the law of husband and wife must be considered in four stages: (1) At common law; (2) in equity; (3) under the half-way statute; and (4) under the complete reform legislation. The first two stages are of general interest and applicable to all jurisdictions alike, where the law is founded upon the common law of England. It is now, however, largely of historical interest. Obviously it is impossible to deal with the two last stages from any "general law" point of view. The best that can be done is to take typical legislation, and to show how the law has developed under it, giving examples of different results under similar statutes to illustrate the varying dispositions of different courts in dealing with the same problem of statutory construction.]—EDITOR'S NOTE.

CHAPTER I

MARRIAGE AS THE TRANSFER OF THE WIFE'S PROPERTY TO THE HUSBAND

SECTION 1.—AT COMMON LAW

LAW AND OPINION IN ENGLAND, by A. V. Dicey, p. 370, note 2: "Outline of effect of marriage at common law as assignment of wife's (W's) property to husband (H).

"(A) W's personal property.

"I. Goods, e. g. money and furniture, in actual possession of W, became the absolute property of H.

"II. W's choses in action (e. g. debts due to W) became H's if he recovered them by law, or reduced them into possession during coverture, but not otherwise.

"III. W's chattels real (leaseholds) did not become H's property, but he might, during coverture, dispose of them (give them away or sell them) at his pleasure, and, if he sold them, the proceeds of the sale were his property.

"On the death of W before H all her personal property, if it had not already absolutely become his, passed to H.

"On the death of H before W, her choses in action, if not reduced into possession, and her leaseholds, if not disposed of by H, remained W's.

"(B) W's freehold estate.

"Any freehold estate of which W was seised vested in W and H during coverture, but was during coverture under his sole management and control.[1]

"On the death of W before H her freehold went at once to her heir, unless H was entitled, through the birth of a child of the marriage, to an interest therein for life by the curtesy of England." [2]

HOWARD v. MENIFEE.

(Supreme Court of Arkansas, 1844. 5 Ark. 668.)

Trover, in the Conway circuit court, determined in October, 1842, before Hon. R. C. S. Brown, judge thereof. Mary E. Menifee, widow, sued Howard, Mason, and Menifee, administrators of Nimrod Menifee, deceased. The declaration contained but one count for a gold watch, and one Durham cow and calf. The following facts were agreed upon by the parties, and submitted to the court sitting as a jury—to wit:

That the plaintiff and the deceased were married in the spring of 1840, and that before marriage she possessed in her own right a gold watch, worth $150. After marriage at request of her husband she gave away the watch to her sister, and received therefor, from her husband, the watch in question, which she received and retained as part of her paraphernalia until after his decease, in January, 1842.

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[1] This was known as the husband's tenancy by the marital right in his wife's real estate. It was an estate in the husband during the joint lives of himself and his wife, which he could convey (Robertson v. Norris, 11 Q. B. 916 [1848]), which his creditors could take on execution (Beale v. Knowles. 45 Me. 479 [1858]; Nicholls v. O'Neill, 10 N. J. Eq. 88 [1854]), and the profits of which the husband could collect (Clapp v. Stoughton, 10 Pick. [Mass.] 463 [1830]). But the estate ceased upon the termination of the marriage by divorce. Doe v. Brown, 5 Blackf. (Ind.) 310 (1840).—Editor's Note.

[2] Curtesy, and the kindred topic, Dower, are here omitted, because the same are dealt with in the casebook on Real Property in this series.—Editor's Note.

That after her marriage she received as a present the Durham cow to be held as her own property. The cow brought forth the aforesaid calf, in the lifetime of the deceased, and both remained in her possession as her own property, until after the husband's death. The cow was taken possession of by the plaintiff in Kentucky. After the death of husband, administration granted defendants in due form of law in said county, who proceeded to administer, and took possession of said property, before suit brought—demand made and refusal.

That the watch is worth $150; the cow $200; and the calf $100. And the defendants still refuse to give them up to her.

That at the time deceased gave the watch, he was possessed of property worth $25,000. That when the defendants took the goods, it was uncertain whether the estate was solvent or not.

That the plaintiff was possessed of the goods sued for, when taken by defendants, and she was in the possession, and used the watch from its first coming to her, until taken by defendants.

On these facts the court found for the widow. The defendants brought error.

SEBASTIAN, J.[3] * * * By the common law, the husband becomes entitled absolutely to all the wife's personal estate, by marriage, and acquired the absolute dominion and right of disposing of it. This was the consequence of the destruction of the separate legal existence of the wife by marriage by which her rights, capacity, and will was henceforth represented by the husband. His right was the same to any acquisitions of the wife after marriage, which enured to his benefit, and to which his assent was presumed. Unquestionably, therefore, the property sued for must be considered at law as belonging to the husband in his lifetime. There is however a qualification of the power of the husband over such property of his wife as is denominated her "paraphernalia." This was something over and in addition to dower at common law, or the widow's "reasonable part" of the personal estate of the husband, and consisted of such jewels, articles of luxury, or of personal ornament and decoration as were used by the wife and suitable to her condition. Though the husband could dispose of them in his lifetime, he could not alienate them at his death. 1 Peere Williams, 730. The right of the widow to that portion of the estate was absolute and exclusive, except as to creditors. She took it as against the heir or legatee, and in the order of paying the debts of the estate, the personal and then the real estate was applied. For this purpose she might have the assets marshalled in a court of equity, in exoneration of her paraphernalia, or to re-imburse the value when it had been subjected. Grulson v. Corbett, 3 Atkins, 370; Tipping v. Tipping, 1 Peere Williams, 729; 2 Peere Williams, 542. From these and many other cases it is evident that the widow's paraphernalia could be subjected by the creditors, and that if subjected, equity gave her a claim of re-imbursement from the personalty and real estate. The right of the administrators to subject the gold watch as assets for the payment of debts cannot be questioned. Considering the facts of the case, it was certainly paraphernalia, and this question is one of which the court is to judge. A watch worn by the widow has been so expressly considered. 2 Eq. Cas. Abr. 156. Her remedy is in equity for the value, should there be assets after the payment of the debts, and no action can be maintained in the present form.

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[3] Statement abridged and part of opinion omitted.

Her claim for the value of the other property mentioned rests upon a different ground. Although it legally vested in the husband, yet as it was the gift to the wife from a stranger, it is presumed to have been for her separate use, and equity regards it as her separate property and upholds the gift by making the husband trustee. In this case it is clear, from well settled principles, that the property passed to administrator, clothed with the trust, and he is liable in equity for the value. An action at law in this form cannot be maintained. The legal title would protect him from damages for a conversion, and as the administrator took, not for the creditors, but for the widow, he is to be considered as a trustee for her, and liable for the value of the property converted, when the proper remedy shall be resorted to.

Judgment reversed.

LEAKEY v. MAUPIN.

(Supreme Court of Missouri, 1847. 10 Mo. 368, 47 Am. Dec. 120.)

SCOTT, J.[4] This was a proceeding commenced in the County Court of Howard county by Maupin, the appellee, to obtain from J. J. Leakey, administrator of Jeremiah Leakey, deceased, a distributive share in right of his wife of the estate of the said Jeremiah Leakey. In 1841, Maupin married S. Leakey, a daughter of the said Jeremiah, who died intestate in March, 1842. In October, 1842, Sarah Leakey, the wife of Maupin, the appellee, departed this life without issue, leaving heirs preferred to her husband as distributee under our statute of Descents and Distributions. No distribution of the estate of her deceased father had been made at the time of the death of Sarah Leakey. The County Court refused Maupin a distributive share of said estate in the right of his deceased wife, and on an appeal to the Circuit Court that judgment was reversed, and the cause brought here.

The only question arising under this state of facts is whether Maupin, the husband of Sarah Leakey, deceased, or her heirs, are entitled to her distributive share in the estate of her deceased father.

If this was a question depending upon the English law for its solution it could not admit of any doubt. By that law the right of the husband as administrator to his deceased wife's choses in action not reduced into possession during the coverture would be unquestionable, but as some of the provisions of the English law in relation to this subject have been omitted and others varying from them have been incorporated into our system of laws, it becomes a question whether a husband under our law is entitled to his wife's choses in action not reduced into his possession during her life-time, she leaving heirs preferred to the husband under our statute of Distribution.

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[4] Part of the opinion is omitted.

In ancient times when a man died intestate, the King, as parens patriæ, took possession of his effects to be employed in defraying the expenses of his burial, paying his debts, and for the support of his wife and children or other kin. The execution of this trust was devolved on the clergy, and many abuses growing out of their conduct in relation to it, the statute of Westminster II (13 Edw. I), which was said to be in affirmance of the common law, enacted that the ordinary should pay the debts of the intestate as far as his goods extended, in the same manner the executors were bound in case the deceased had left a will. But the residuum after payment of debts remained in the hands of the ordinary to be applied to any purposes his conscience might approve. Great abuses arising under the exercise of this power, the Legislature again interposed, and by the statute of 31 Edw. III, required the ordinary to depute the next and most lawful friends of the intestate to administer his goods. This is the origin of administrations in England. The statute 21 Hen. VIII, enacted that administration might be granted by the ordinary to the widow of the deceased or his next of kin, or both in his discretion. In none of the statutes on the subject of Administration is express mention made of the right of the husband to administer on his deceased wife's estate. His right was always unquestioned, and the only dispute was as to the source of that right; some holding that he held it under the statute 31 Edw. III, as the next and most lawful friend of his wife; others, that he derived it from the common law, and that the husband jure mariti was entitled to administer on his deceased wife's effects, but the right being established and admitted on all hands its source was a matter of no importance.

As the appointment of an executor was by common law a gift to him of the residuum after the payment of the funeral expenses and the debts, as a recompense for his trouble for administering, so the administrator coming in the place of the executor had the whole personal estate of the intestate after the payment of debts (2 Bac. 72), the writ de rationabile parte bonorum to which the wife and children were entitled being grounded on the customs of London and York, and some other places (3 Th. Coke, 317). The hardship of this privilege upon the next of kin of the intestate, was the occasion of making the statute of 22 and 23 Chas. II, cap. 10, which compelled the administrator, after the payment of funeral charges, debts and all expenses, to distribute the remainder of the personal estate to the wife and children and children's children, if any there be, or otherwise to the next of kindred to the dead person.

We have seen that the husband was entitled to administration on his deceased wife's estate, and like all other administrators, had, by the common law, exclusive enjoyment of the residuum after the payment of the debts. Doubts arose under the statute of Charles, before recited, whether the husband, like all other administrators, was not compelled to make distribution among the next of kin of the wife. To remove these doubts the 25th section was engrafted on the statute of Frauds and Perjuries, 29 Chas. II, which provided that "the act of 22 and 23 of Chas. II, cap. 10, nor anything therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act." [5]

We have not adopted into our system of laws this section, but on the contrary it is provided by the statute of Descents and Distributions, § 3, that if there be no children nor their descendants, father, mother, brother nor sister, nor their descendants, nor any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. From the omission of a provision similar to that contained in the 25th section of the act of 29 Chas. II, and the insertion of a provision that the husband should only receive his deceased wife's estate in the event of there being no children, father, mother, brother, sister, nor any maternal nor paternal kindred capable of taking, the inference would seem irresistible that it was not the intention of the Legislature that the husband should receive his wife's estate and not account for it as other administrators. * * *

In this case Maupin claimed as husband and not as administrator of his wife. Our statute gives the right of administering on his deceased wife's estate to the husband, and had Maupin claimed a distributive share of J. Leakey's estate as administrator of his wife, he would have been entitled to recover, but for the reasons given before, he would have held the amount received as trustee for his wife's next of kin. The other Judges concurring, the judgment below is reversed, and it is considered that Maupin take nothing by his plaint, and that the appellant go hence without delay and recover his costs.[6]

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[5] Accord: Judge of Probate v. Chamberlain, 3 N. H. 129 (1824); Stewart v. Stewart, 7 Johns. Ch. (N. Y.) 229 (1823); Brown v. Alden, 14 B. Mon. (Ky.) 141 (1853).

[6] Wilson v. Bates, 28 Vt. 765 (1856); Dixon's Adm'r v. Dixon, 18 Ohio, 113 (1849); Baldwin v. Carter, 17 Conn. 201, 42 Am. Dec. 735 (1845); Cox v. Morrow, 14 Ark. 617 (1854); Carter v. Cantrell, 16 Ark. 155 (1855). See, also, Townsend v. Radcliffe, 44 Ill. 446 (1867).

LOVE v. MOYNEHAN.

(Supreme Court of Illinois, 1855. 16 Ill. 277, 63 Am. Dec. 306.)

SKINNER, J.[7] This was an action of trespass, brought in the Cook circuit court to the November term, 1852, by Ann Moynehan against Love and Love, to recover damages for the defendants entering the plaintiff's dwelling, and taking and carrying away her goods. The defendants plead in abatement, the coverture of the plaintiff.

To this plea, the plaintiff replied that, in the year 1847, her husband deserted and forsook her without cause, and departed from the place of their abode without leaving her any means of support, and from thence thereafter had not corresponded with her nor returned to her, nor in any manner provided for her support, and that during said time, she had been compelled to rely wholly upon her own earnings for a support, and had by her own earnings, supported herself and family during said time, and had not heard from and did not know where her husband was, nor if he was still living; that during all said time of five years, she had necessarily acted and traded as a femme sole, and that the property upon which the trespasses complained of in her declaration were committed, had been acquired and earned by her since the said desertion of her husband; that her said husband had never been a resident of this State, but was, and ever had been, a resident of a foreign State.

The defendants took issue upon this replication, traversing all the facts therein alleged, and the plaintiff joined issue. The cause was tried by jury, and the issue was found for the plaintiff and damages assessed against the defendants.

The defendants moved for a new trial, which motion was overruled, and judgment was rendered upon the verdict. * * *

But it is contended that the replication is no answer to the plea of coverture, and that therefore judgment ought not to be for plaintiff. This court will presume, as the bill of exceptions does not set out all of the evidence, that the facts alleged in the replication were proved, and if the facts alleged in the replication are sufficient to avoid the coverture alleged in the plea, in any view of this case, the judgment must be affirmed.

This is an important question, upon which the decisions in England and in this country, are conflicting, and is an open question in this court. It is a principle of the common law, that marriage merges the civil rights of the woman; that she is thereby deprived of her separate legal existence, and that the husband and wife are but one person. She cannot, therefore, generally, during the life of the husband, sue or be sued, contract or be contracted with. The law presumes the husband and wife live together; that the wife is provided for, and protected by the husband; that their interests are common and identical, and makes the husband liable for the wife's civil conduct while she remains under his control and protection.

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[7] Part of the opinion is omitted.

When, by the fault of the husband, the wife is deprived of these and all benefits accruing to her from the marriage, of any substantial importance, it is but reasonable that she should be restored to her civil rights, at least so far as is indispensable to that actual separate existence he has forced upon her.

The very necessity of cases which have arisen from time to time, has produced and established exceptions to the rule that a married woman can neither sue or be sued. These exceptions have been extended and narrowed according to the notions of courts and the temper of the times, and at this day, no uniform rule exists, at least in this country, as to when a married woman can and cannot sue and be sued.

Under these circumstances, we feel at liberty to adopt such rule as will best meet the exigencies of society, and accord with the current of modern authority. In the case of Rhea et al. v. Rhenner, 1 Pet. 105, 7 L. Ed. 72, the Supreme Court of the United States held, that where the wife was left by the husband without maintenance or support; had traded as femme sole, and obtained credit as such, she was liable to be sued, and that the law was the same whether the husband had been banished for crime, or had voluntarily abandoned the wife.

In Gregory v. Paul, 15 Mass. 31, it is held, that where the husband deserted his wife in England, and she came to Massachusetts, and maintained herself as a single woman for five years, the husband being still in England, the wife might sue as a femme sole.

In the same State it is also held that a woman living separate from her husband, under a divorce, a mensa et thoro, may sue as a femme sole. Dean v. Richmond, 5 Pick. (Mass.) 461. The same court held that where the husband, living in New Hampshire, by his cruelty drove his wife from his house without providing for her, and she came to Massachusetts, and maintained herself for many years, the husband having re-married in a foreign State, and married another woman, the woman might sue as a femme sole. Abbott v. Bayley, 6 Pick. (Mass.) 89.

In Cornwall v. Hoyt, 7 Conn. 427, it is held, that where the husband abandoned this country in time of war, and joined the enemy, the wife remaining in this country might contract as a femme sole. In the case of Gregory v. Pierce, 4 Metc. (Mass.) 478, the doctrine is recognized, that desertion of the wife by the husband, without providing for her, and without the intention of returning or living with her, will enable her to sue as a femme sole.

In the case of Arthur and Another v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707, the court held, that where the husband had abjured the State, his wife remaining and doing business as a femme sole, she might sue upon and collect notes given her in her own name. The same doctrine is recognized in James v. Stewart et al., 9 Ala. 855; and that to depart the State permanently, with the intention of not returning, is to abjure the State.

In Roland v. Logan, 18 Ala. 307, it is held that a married woman, having separated from her husband in another State, and removed to Alabama, and by her industry for several years maintained herself and family, the husband, meantime, residing in the State from whence she came, and asserting no claim to her acquisitions, may be regarded as a femme sole.

In South Carolina it is held, that if the husband depart from the State for the purpose of residing abroad, without intention of returning, such absence renders the wife competent to contract, sue and be sued, as a femme sole. Bean v. Morgan, 4 McCord, 148. The same doctrine is laid down in Cassock and Wife v. White, 3 Mill, Const. 282.

In Missouri it is held, that where the husband in another State, compelled his wife to leave him, and she went to Missouri, and resided many years, her husband remaining in another State, and acted as a femme sole, she might acquire property, execute a valid release, sue and be sued. Rose v. Bates, 12 Mo. 47.

In Pennsylvania it is held, that a married woman, whose husband was a mariner, and had been absent more than two years, leaving her no means of support, might be considered a femme sole, and receive a distributive share of her ancestor's estate. Valentine v. Ford, 2 Browne, 193.

In Starrett v. Wynn, 17 Serg. & R. 130, 17 Am. Dec. 654, it is held, that if a husband deserts his wife, and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion, are separate estate, and that she may dispose of such property by will or otherwise.

These cases are undoubtedly relaxations of the rigid rules of the ancient common law, or rather exceptions to those rules, and are in conflict with many other cases, but are sufficient to show that the view we take is not wholly novel.

In case of abandonment of the wife by the husband, the reason of the rule of the common law concerning the marital relations, ceases to exist, and with the reason, the rule should cease, when demanded by the necessities of justice.

Why should a woman, abandoned by her husband, and without means of living, not be permitted to provide for the necessities of herself and family by industry and economy, to acquire property, to control her own actions, and to protect her person and acquisitions? Illustrations of extreme hardship might be given without limit, but they are familiar to every observing person. It is true, the law provides for divorce from the bonds of matrimony in certain cases, but many women have conscientious scruples against obtaining a divorce, and should not be compelled to violate conscience to acquire the mere ability of living by the fruits of their own labor.

The husband is discharged from his liability to provide for the wife, if she, without cause, abandons him, and why the wife being abandoned by the husband, should be kept continually subject to his plunder, or to that of his creditors, must be hard to answer. Evans v. Fisher, 5 Gilm. 569; McCutcheon v. McGahay, 11 John. (N. Y.) 282, 6 Am. Dec. 373; Rutherford v. Coxe, 11 Mo. 348.

We hold the law to be, that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent, and without expectation of again living together, and the wife is unprovided for by her husband, in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a femme sole, during the continuance of such condition.

But if such separation is the fault of the wife, she can acquire no rights thereby.

No question is raised to the propriety of interposing the defense in abatement instead of in bar to the action, and no opinion is expressed upon that point.

Judgment affirmed.

SECTION 2.—IN EQUITY

LAW AND OPINION IN ENGLAND, by A. V. Dicey, pp. 373–375: "In 1800 the Court of Chancery had been engaged for centuries in the endeavour to make it possible for a married woman to hold property independently of her husband, and to exert over this property the rights which could be exercised by a man or an unmarried woman. Let it, however, be noted, that the aim of the Court of Chancery had throughout been not so much to increase the property rights of married women generally, as to enable a person (e. g. a father) who gave to, or settled property on a woman, to ensure that she, even though married, should possess it as her own, and be able to deal with it separately from, and independently of, her husband, who, be it added, was, in the view of equity lawyers, the 'enemy' against whose exorbitant common-law rights the Court of Chancery waged constant war. By the early part of the nineteenth century, and certainly before any of the Married Women's Property Acts, 1870–1893, came into operation, the Court of Chancery had completely achieved its object. A long course of judicial legislation had at last given to a woman, over property settled for her separate use, nearly all the rights, and a good deal more than the protection, possessed in respect of any property by a man or a feme sole. This success was achieved, after the manner of the best judge-made law, by the systematic and ingenious development of one simple principle—namely, the principle that, even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty it was to carry out the terms of the trust. Hence, as regards the property of married women, the following results, which were attained only by degrees.

"Property given to a trustee for the separate use of a woman, whether before or after marriage, is her separate property—that is, it is property which does not in any way belong to the husband. At common law indeed it is the property of the trustee, but it is property which he is bound in equity to deal with according to the terms of the trust, and therefore in accordance with the wishes or directions of the the woman. Here we have constituted the 'separate property,' or the 'separate estate' of a married woman.

"If, as might happen, property was given to or settled upon a woman for her separate use, but no trustee were appointed, then the Court of Chancery further established that the husband himself, just because he was at common law the legal owner of the property, must hold it as trustee for his wife. It was still her separate property, and he was bound to deal with it in accordance with the terms of the trust, i. e. as property settled upon or given to her for her separate use."

POMEROY'S EQUITY JURISPRUDENCE (3d Ed.) vol. 3, § 1114: [The Wife's Equity to a Settlement.][8] "The origin of this peculiar equity, as an application of the maxim, He who seeks equity must do equity, has been fully explained in a former chapter. The wife's equity to a settlement does not depend upon her right of property in the subject-matter, for it must be enforced for the benefit of herself and her children, and the amount is wholly discretionary with the court; it is an obligation which the court fastens, not upon the property, but upon the right to receive it,—the right of her husband and those claiming under him to receive it, as well as that of the wife. The doctrine was first applied to cases only where the husband resorted to the jurisdiction of equity in order to enforce his jus mariti and reach assets belonging to his wife. Having been established in this application, it was soon extended to cases where the general assignees in bankruptcy or insolvency of the husband sought the aid of equity in reaching property of the wife; the court imposed on them the same conditions which it would impose on the husband himself. The next step was soon taken, and the doctrine was applied to particular assignees of the husband for a valuable consideration, whenever they attempted to enforce their assignments by a proceeding in equity. In these early stages of the doctrine, the court was always set in motion by the husband or his assignees, and it was formerly supposed that this was essential; it is now settled, however, that the wife may herself originate the proceeding, and may maintain a suit for a settlement. A court of equity will not, therefore, interfere with the purely legal rights of the husband, or of his assignees, which can be completely enforced at law, without the aid of equity, and where the property is not already in the custody or under the immediate control of the court of equity. The general doctrine may be formulated as follows: Where the husband, or some person claiming under him, is suing in equity to reach the wife's property; and where the property is already within the reach of the court,—as where it is vested in trustees, or has been paid into court, or is in any other situation which brings it under the control of the court,—the court of equity will not grant the relief in the first instance, nor permit the property to be removed out of its jurisdiction and control in the second, until an adequate provision is made for the wife, unless special circumstances exist which defeat her right; and under a like condition of the property, the wife may herself institute a suit and obtain the relief."

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[8] The learned author's citations are omitted.

PROUDLEY v. FIELDER.

(High Court of Chancery, 1833. 2 Mylne & K. 57.)

In contemplation of a marriage between Mr. Philip Holman Leader and Mrs. Lydia Dawson, articles of agreement were entered into between them, and signed by both parties. After stating that Mr. Leader was seised of a certain freehold estate therein described, situate at New Brentford, and that Mrs. Dawson was possessed of certain copyholds of inheritance therein described, situate at Isleworth and Old Brentford, and that Mrs. Dawson was also possessed of monies on securities, and of monies in the government funds, the articles continued as follows: "A marriage is intended to be had between Mr. Leader and Mrs. Dawson; and it is agreed that Mrs. Dawson shall, on such marriage taking place, surrender the said copyholds to the said Mr. Leader in fee, and that all other the estate and effects of the said Mrs. Dawson shall, upon the said marriage taking place, be and become the property of the said Mr. Leader, except the monies in the funds. And it is agreed that the said monies in the funds shall be for the sole and separate use of the said Mrs. Dawson, to all intents and purposes, as if she were sole and unmarried; and that the said monies shall be conveyed or transferred to trustees, and a proper settlement executed, so as fully to carry into effect the intention of the parties; and in case of the said marriage taking effect, and the said Lydia Dawson surviving the said Philip Holman Leader, she the said Lydia Dawson shall hold and enjoy the rents and profits of the freehold estate of the said Philip Holman Leader for her life."

The marriage took effect, but no settlement was ever executed. The wife died in the husband's lifetime without issue, and without having made any appointment of her separate property; and the husband took out administration to her estate. The husband having subsequently died, the bill was filed by the next of kin of the wife against the executors of the husband's will, and against certain of his legatees; and it prayed a declaration that, upon the true construction of the articles, the Plaintiffs were entitled to the wife's property in the funds, as if she had not been married.

THE MASTER OF THE ROLLS [Sir JOHN LEACH]. These monies were to be for the sole and separate use of Mrs. Leader, as if she were sole and unmarried. This expression has no reference to the devolution of the property after her death. She is to retain the same absolute enjoyment of the monies, and is to have the same power of disposition over them, as if she were sole and unmarried; but there is not one word here to vest the property after her death in her next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator.[9]

SECTION 3.—UNDER THE FIRST MARRIED WOMEN'S LEGISLATION

Laws Ill. 1861, p. 143: "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person, other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

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[9] Accord: Cooney v. Woodburn, 33 Md. 320 (1870); Brown v. Alden, 14 B. Mon. (Ky.) 141 (1853), semble. In Townsend v. Radcliffe, 44 Ill. 446, 449 (1867), the court would seem hardly to have been justified in saying that the mere fact that the wife had a separate legal estate under the married women's act of 1861 caused her interest to pass at her death to her next of kin and not to her husband alone.

SOUTHARD v. PLUMMER.

(Supreme Judicial Court of Maine, 1853. 36 Me. 64.)

Trespass for breaking and entering the plaintiff's close, and carrying away therefrom several articles of his personal property.

In March, 1848, the plaintiff married a woman who owned a farm, with a house upon it, and articles of furniture and other personal property.

Testimony was introduced tending to show, that after the marriage and while the plaintiff and his wife were residing together in the house, the defendants entered and removed from the house the articles as mentioned in the declaration of the plaintiff's writ.

The defendants introduced evidence tending to prove that the articles belonged to the wife before and at the time of the marriage, and that it was by her order that they entered the house and carried them away.

The jury were instructed, that if the real estate entered upon and the articles of property taken were the property of the wife before the marriage, and if the entry and taking were by her direction and under her inspection, the action was not sustainable. To that instruction the plaintiff excepted, the verdict having been against him.

WELLS, J. Both the real and personal property, in reference to which the trespass is alleged to have been committed, belonged to the wife of the plaintiff at the time of the coverture, and when the acts, of which complaint is made, were done by the defendants. They acted under the authority of the plaintiff's wife, and the question presented is, whether they were justified in conforming to her orders and directions.

By the common law the husband has a freehold estate in the real property of the wife, and the use and control of it, and by the marriage the title to personal chattels in her possession passes to him.

By the Act of March 22, 1844, c. 117, § 2, it is provided, that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold, and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband."

The phrase, "such property shall continue to her notwithstanding her coverture," implies that it shall remain her property, and that the coverture shall not deprive her of it, and the possession of it "as her separate property" gives her an entire dominion over it. This language could not have been employed simply for the purpose of exempting the property from attachment for the debts of the husband, and from liability on his contracts. It is very evident, that something more was intended, that her right of property and control over it should remain, not only against the creditors and contracts of the husband, but against the husband himself.

This construction is strengthened by the terms of the third section of the Act, which provides, that "Any married woman possessing property by virtue of this Act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof; so long as the same shall be appropriated for the mutual benefit of the parties." The control of the property having been given to the wife, it then became necessary by further legislation to authorize her to release it to the husband.

And as the wife of the plaintiff did not release it to him, it continued to her and she could direct the defendants to enter upon the real estate, and take and carry away the personal property. It would be doing violence to the language and spirit of the Act to say, that it did not confer upon the wife the control of the property independently of her husband. And she might exercise that control herself personally, or through the agency of another. The statute having given to her the direction and management of her property, would necessarily and by implication clothe her with all the power requisite for the performance of those acts, and would justify the defendants, who were employed by her.

Exceptions overruled.[10]

HOWARD and HATHAWAY, JJ., concurred. RICE, J., dissented.

PARENT v. CALLERAND.

(Supreme Court of Illinois, 1872. 64 Ill. 97.)

The plaintiff married subsequent to the year 1861. At the time of her marriage she owned certain real estate in fee. This she leased after her marriage to the defendant for ten years. In this lease her husband did not join. The plaintiff gave the defendant notice to quit at the end of the first year. The defendant was not in default in any way under the terms of the lease. He refused to quit and thereupon the plaintiff brought a forcible entry and detainer suit against him for possession. There was a judgment for the plaintiff. The case was brought to this court on a writ of error.

Mr. Justice SCOTT[11] delivered the opinion of the court. * * * The only point made by counsel is, whether a married woman can execute a lease on her separate real estate for a term of years that will be binding during coverture, without her husband joining in the execution or consenting thereto. We are of opinion that she can.

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[10] It makes no difference that the husband reduced the chattels to possession. Ago v. Canner, 167 Mass. 390, 45 N. E. 754 (1897). The same rule prevails as to the wife's choses in action. Barton v. Barton, 32 Md. 214 (1869); Johnson v. Johnson's Committee, 122 Ky. 13, 90 S. W. 964, 28 Ky. Law Rep. 937, 121 Am. St. Rep. 449 (1906). In Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398 (1866), it was held that the married woman could alienate her interest in a life insurance policy even to secure the debt of her husband.

[11] Statement abridged and part of opinion omitted.

We attach no importance to the fact that the lease in this instance is under seal and was regularly acknowledged. A lease not under seal or acknowledged would be of equal validity with the one in this record and would be no more and no less binding on the defendant in error.

By the act of 1861, it is provided that "all the property, both real and personal, belonging to any married woman as her sole and separate property, * * * together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried."

This statute makes a marked change in the common law in regard to the separate property of married women. It was doubtless intended to and does confer upon a married woman the right to enjoy the rents and profits of her separate estate independently of and free from any interference on the part of her husband; and if it shall accomplish this purpose, it must be construed to confer all power necessary to carry into effect the intention of the legislature in its passage. It is not to be supposed that the act of 1861 confers upon married women the power to enter into contracts generally, or that it avers the common law in that regard except so far as it may be necessary to effectuate the right conferred, viz: the enjoyment of her separate estate, notwithstanding her marriage, the same as though she was sole and unmarried.

This act, like all other statutes, must have a reasonable construction. A law that confers the right to the enjoyment of her separate estate does not, by mere implication, necessarily confer the power on a married woman to sell and convey her real estate without the consent of her husband, and so it was held in Cole v. Van Riper, 44 Ill. 58. As was said in that case, "the power to own and enjoy is entirely different from the power to dispose of, and the latter is not necessary to the exercise of the former." The words "hold, own, possess and enjoy," used in the statute, would seem to imply that the legislature intended to confer with the right the power also to enable a married woman to lease for a time or term of years any lands which she may own in her own right. If she does not possess this power, then indeed she can not own, possess and enjoy her separate estate "the same as though she was sole and unmarried." A state of case might arise in which there would be no way in which she could avail of the rents and profits of her real property unless the law confers the authority to lease the same without the consent of the husband to such leasing. It would be a narrow and illiberal construction of the statute to hold that a married woman must herself cultivate and farm her lands to enable her to appropriate to herself the profits and increase accruing therefrom.

In construing this statute in regard to the rights of married women, it was said by this court, in Carpenter et al. v. Mitchell, 50 Ill. 470, "if she owns houses she must be permitted to contract for their repair or rental. If she owns a farm she must be permitted to bargain for its cultivation and to dispose of its products."

It is obvious that the legislature, in thus conferring upon a married woman the right to own, possess and enjoy her separate real estate, intended to and did so modify the common law that she could, in her own name and in her own right, contract in regard thereto to effectuate that object. If such was not the case, the provision in her behalf would be a mere barren right, fruitless of any good results. The true construction of the act in question is that, by implication at least, she has power under the statute to make all such contracts in regard to her real estate as may be necessary to its full and complete enjoyment. Under the power thus conferred no reason is perceived why a married woman may not execute in her own name a lease for a term of years upon any lands which she may own, without her husband joining in the execution or consenting thereto, that will be as binding during coverture as though she was sole and unmarried.

It being lawful for her to so contract in regard to her own property, she cannot be permitted to retract whenever she may happen to make a disadvantageous bargain. Like other persons, she must abide the consequences of her own contracts in regard to subjects about which it is lawful to contract, and which have been fairly made without any fraudulent practices.

The law will enforce such a contract on her behalf when it is to her advantage to have it done; and if she avails of the benefits, she can not be heard to complain that the court will enforce a like contract against her.

In the present instance no reason is assigned by the defendant in error why she seeks to rescind the contract, except that it is not binding in law. It appears from the agreed statement of facts that the plaintiff in error had complied in every particular with the terms of the lease, and she could not capriciously repudiate it. It was a contract in regard to her separate property, fairly entered into, and it must be held to be valid in law and binding on both parties.

The judgment finding the defendant in the court below guilty was contrary to the law and the evidence, and must be reversed and the cause remanded.

Judgment reversed.

WOODWARD v. WOODWARD.

(Supreme Court of Missouri, 1898. 148 Mo. 241, 49 S. W. 1001.)

The plaintiff is the wife of the defendant James Woodward. They were married in 1889. During the marriage the plaintiff purchased land partly with money which she had at the time of her marriage and partly with her husband's money. The plaintiff and defendant are living apart. The plaintiff filed a petition charging the above facts and that her husband collected all the rents and profits of the land for 1895, and is assuming and exercising control of said tract; that she has never authorized him so to do; that the said tenant is cultivating and occupying said lands without plaintiff's consent, and against her protest, asserts that he is bound to pay the rents to plaintiff's husband; that said rents and profits are her sole reliance for the support of herself and children; that she is without remedy at law. Wherefore she prays that James Woodward be required to account to her for said rents and profits by him received from her said lands, and that both defendants, their servants and agents be forever enjoined and restrained from using or exercising control over plaintiff's said land, and that plaintiff be put in possession and control of the same. Defendant in his answer somewhat amplified the foregoing facts, and relied upon the facts that plaintiff had left him without just cause, had sued him for divorce, and failed to obtain it; that he afterwards invited plaintiff to return to his home but she refused to do so. Wherefore he says she has no equity and put herself in a position that a court of equity will not aid her. The circuit court granted a perpetual injunction restraining defendants from interfering with plaintiff in the use and control of said tract.

Defendants appeal, and assign numerous errors.

Gantt, P. J.[12] [after stating the case and approving the finding of the trial court that the property of the husband used in the purchase of the land was a gift from the husband to the wife and that the entire land was her separate estate, continued as follows:]

This tract being then, under the existing law, the separate estate of the wife, "with all income, increase and profits thereof," and "under her sole control," a third proposition is advanced by the husband and it is this: He insists that as the wife is seised of an estate of inheritance and there are two children born of the marriage, and still living and capable of inheriting the land upon their mother's death, he has an estate by the curtesy initiate, and waiving all other questions this entitles him to the possession of the land.

That such is the common law and the law of this State with respect to the ordinary legal estate of the wife, unless modified or changed by this statute, admits of no discussion. 1 Wash. Real Prop. (5th Ed.) p. 188; Clay v. Mayr, 144 Mo. 376, 46 S. W. 157.

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[12] Statement abridged and part of opinion omitted.

It is also well settled law in Missouri that a husband is entitled to curtesy in the equitable separate estate of the wife, of which she died seised, although limited to her separate use. Alexander v. Warrance, 17 Mo. 228; Tremmel v. Kleiboldt, 75 Mo. 255; Soltan v. Soltan, 93 Mo. 307, 6 S. W. 95.

While the statement is general that the husband, all the requisites concurring, is entitled to curtesy in his wife's separate estate, an examination of the decided cases, as well as sound reason, will demonstrate that it does not and cannot mean that "curtesy initiate" in such a case will entitle him to the rents and profits of his wife's separate estate during coverture and thus nullify the provisions of the trust itself,[13] but the statement goes no farther than to assert that he is entitled to his estate by the curtesy after her death, and even this right may be cut off by a clearly expressed intention in the will or deed creating the separate estate. 4 Am. & Eng. Ency. Law, p. 965; 1 Wash. Real Prop. (5th Ed.) 176–177; 4 Kent, Com. 31, 32; Carter v. Dale, Ross & Co., 3 Lea (Tenn.) 710, 31 Am. Rep. 660.

With this understanding of the law as it existed in this State prior to the adoption of the Married Woman's Act of 1889 (section 6869, Rev. St. 1889), we inquire what was the purpose of the legislature, with regard to a married woman's estate acquired as plaintiff's was by purchase. It is obvious that the estate of his wife should be her separate estate, and second, that the income, increase and profits thereof should be hers, and under her sole control.

If we are not by judicial construction to emasculate and nullify this plain statute it unquestionably means that the wife alone has the right to the rents, issues and products of her land, and her husband has no right to interfere with or withhold them.

This construction does not necessarily conflict with the right of curtesy, further than it does in separate equitable estates in simply denying the husband the possession and profits during coverture, but it does conflict with the right of a tenant by the curtesy initiate to that extent.

The remaining contention, that the wife's right to her separate estate is dependent upon her living with her husband, finds no countenance in the statute. No such condition is attached to her title. It is hers absolutely, whether she be faithful or unfaithful to her marital obligations. * * *

The decree is affirmed.[14]

SHERWOOD and BURGESS, JJ., concur.

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[13] Buckalew v. Blanton, 7 Cold. (Tenn.) 214 (1869).

[14] Accord: Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324 (1878); Kip v. Kip, 33 N. J. Eq. 213 (1880); Sudbo v. Rusten, 66 Minn. 108, 68 N. W. 513 (1896); King v. Davis (C. C.) 137 Fed. 222 (1905); Indianapolis, D. & W. Ry. Co. v. McLaughlin, 77 Ill. 275 (1875), semble.

SECTION 4.—UNDER THE LATER MARRIED WOMEN'S ACTS

Rev. St. Ill. 1874, c. 68, § 9: "A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him. * * *"

CHAPTER II

HUSBAND'S RIGHT TO THE EARNINGS, SERVICES, AND SOCIETY OF HIS WIFE AND TO AN ACTION FOR DAMAGES TO HIS RIGHT IN THE WIFE, AND VICE VERSA—EMANCIPATION

SECTION 1.—THE HUSBAND'S RIGHT

I. At Common Law

BUCKLEY v. COLLIER.

(Mich. 4 W. & M. B. R., 1693. 1 Salk. 114.)

Baron and feme declared, That the defendant being indebted to them for work done by the wife, in making him a peruke, he promised to pay, and had not paid, ad dampn. ipsorum, &c. To this there was a frivolous plea, and upon that a demurrer. The plaintiff cited 3 Cro. 205; 3 Cro. 61, 96; 1 Cro. 438; but relied principally upon Burchet's case.

Per Cur. Burchet's case differs: there was an express promise to the wife, and to that the husband assented by bringing action thereupon: but here is no express promise laid to the wife; here is nothing but the promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he may bring a quantum meruit. Also the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband; for if the wife dies, her debts fall upon the husband; and therefore so shall the profits of her trade to the husband's executors. But this must be intended of work done during the coverture, and not after. Judgment pro def.

SMITH v. CITY OF ST. JOSEPH.

(Supreme Court of Missouri, 1874. 55 Mo. 456, 17 Am. Rep. 600.)

Wagner, Judge.[1] This was an action instituted by the plaintiff to recover damages for the loss of the services of his wife, and necessary expenses of medicine, doctor's bills and nurse hire paid out by him, in consequence of an injury to her which is alleged to have been occasioned by the negligence of the defendant. The charge is, that the injury to the plaintiff's wife was the result of her falling down an enbankment in one of the streets of the defendant, which was negligently left in an exposed and dangerous condition. One branch of this case has previously been in this court. Smith v. City of St. Joseph, 45 Mo. 449. There the proceeding was in favor of the wife as the meritorious cause of action, the husband being joined with her under the requirements of the statute, to recover damages for the personal injuries and physical suffering that she had sustained. But the petition was founded upon the same accident, and the same questions in regard to defendant's liability and negligence arose in that case that arise here.

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[1] Parts of the opinion are omitted.

The rules of law then laid down, were strictly conformed to and pursued in the trial of this case, on the questions of defendant's liability and negligence, and therefore it is unnecessary to review them at the present time. * * *

The main questions, however, relied on for a reversal of this judgment, are, that the former judgment was a bar to the maintenance of this action, and that the court erred in its instruction in reference to damages. The judgment rendered in favor of plaintiff and wife in the former suit was solely for the damages resulting to the wife in consequence of the injuries received by her. She was the meritorious cause of the action, and the husband was merely joined under the provisions of the statute to enable her to sue. But the damages there were strictly confined to her personal injuries, and the expenses incurred by the husband, and loss of service which constitute the foundation of this action were not in that case. In some of the New England States, under the provisions of statutes regulating the subject, it is held that but one action can be maintained. Those statutes permit all the damages incident to and growing out of the injury to be recovered in the same suit. They provide for but one action. But in the other States, where no such statutory regulations exist, a contrary doctrine is held. In the case of McKinney v. Western Stage Co., 4 Iowa, 420, the court says: "We suppose that at common law the rule is well settled, that for an injury to the person of the wife during coverture, by battery or to her character by slander or any such injury, the wife must join with the husband in the suit. When, however, the injury is such that the husband receives a separate loss or damage as, if in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name. Barnes v. Hurd, 11 Mass. 59; Lewis v. Babcock, 18 Johns. (N. Y.) 443; 2 Saund. Pl. & Ev., 568. And this rule we do not understand to be changed by the code."

The Indiana Court holds, also, that the established doctrine is, that for a tort committed upon a wife, two actions will lie, one by the husband alone for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person. Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Ohio & M. R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Boyd v. Blaidell, 15 Ind. 73.

In the case of Fuller v. Naugatuck R. R. Co., 21 Conn. 557, it is said that it was clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. The same principle has been often adjudged in different cases and laid down in elementary treatises. Reeve's Dom. Rel., 291; Whitney v. Hitchcock, 4 Denio (N. Y.) 461; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; Bartley v. Ritchtmeyer, 4 N. Y. 38, 53 Am. Dec. 338; Klingman v. Holmes, 54 Mo. 304.[2]

We think there can be no doubt respecting the maintenance of the action, and that there is no bar in consequence of the previous recovery. On the question of damages the court instructed the jury, that if they found for the plaintiff they should assess his damages at such sum, as was shown by the evidence would compensate him for the expenses he had necessarily incurred, in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained in falling over the embankment, including compensation for his services in waiting upon her, doctor's bills, and costs of medicines and also for the loss of her services directly resulting from the injury. The only serious objection made to this instruction is, that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. Under all the circumstances surrounding this case, I think the instruction was right.[3] The evidence shows that the wife's thigh bone was broken by the fall; that for two months she was so utterly helpless that her husband had to be constantly at her bedside and assist her even to move. During all this time he did not take off his clothes, as his attentions were required to be unceasing and unremitting. The husband then had to neglect all his business to perform this painful duty, and if he had not done it in person, he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case therefore, I think the instruction was justified. * * *

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[2] Accord: Skoglund v. Minn. St. Ry., 45 Minn. 330, 47 N. W. 1071, 11 L R. A. 222, 22 Am. St. Rep. 733 (1891); Duffee v. Boston Elevated Ry. Co., 191 Mass. 563, 77 N. E. 1036 (1906). In Holleman v. Harward, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672 (1896), it was held that a husband may recover damages from a druggist who, against the husband's orders, sold laudanum to his wife, in consequence of which she became a confirmed subject of the opium habit, resulting in the loss of her earnings, services, and companionship. See, also, Hoard v. Peck, 56 Barb. (N. Y.) 202 (1867).

[3] Recovery may be had for future loss of services accruing after the trial. Hopkins v. Atlantic & St. L. Ry., 36 N. H. 9, 72 Am. Dec. 287 (1857); Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545 (1906); Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476 (1899); Reagan v. Harlan, 24 Pa. Super. Ct. 27 (1903); Hadsoll v. Stallebrass, 11 Ad. & El. 301 (1840). But some evidence must be given of the prospective damage. Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 South. 363, 109 Am. St. Rep. 40 (1904).

But, if the wife is dead before the action is brought, recovery is limited to damages occurring to the husband before her death, and no prospective damage for loss of services, society, and earnings which would probably have been rendered can be recovered. Baker v. Bolton, 1 Campb. 493 (1808); Hyatt v. Adams, 16 Mich. 180 (1867); Mowry v. Chaney, 43 Iowa, 609 (1876); Eden v. Lexington, etc., Ry. Co., 14 B. Mon. 204 (2d Ed.) 164 (1853); Nixon v. Ludlam, 50 Ill. App. 273 (1893). Contra: Cross v. Guthery, 2 Root (Conn.)

Judgment affirmed. All the Judges concurred.

BIGAOUETTE v. PAULET.

(Supreme Judicial Court of Massachusetts, 1881. 134 Mass. 123, 45 Am. Rep. 307.)

Tort in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society and benefit. Writ dated April 9, 1877. Trial in the Superior Court, before Rockwell, J., who allowed a bill of exceptions, in substance as follows:

The only witnesses were the plaintiff and his wife. The wife testified that the plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under the defendant, and that the parties were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, the defendant told the plaintiff's wife that he would turn her husband away from the factory if she refused to receive the defendant's visits; that on July 5, 1876, the defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and the defendant, and three days afterwards the plaintiff was discharged from the factory by the defendant; that shortly after July 5, 1876, the plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family from the time of the assault up to the time of her confinement, but that her performance of these

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90, 1 Am. Dec. 61 (1794); Ford v. Monroe, 20 Wend. (N. Y.) 210 (1838). If, therefore, the wife is instantly killed, no cause of action at all arises in favor of the husband. Green v. Hudson River Ry. Co., 2 Abb. Dec. (N. Y.) 277 (1866). See ante, pp. 59–72, on similar questions arising where the parent sues for damages to his right in his child.

duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of a loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for the assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word consortium,—the right to the conjugal fellowship of the wife, to her company, coöperation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass vi et armis. In regard to the others, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, per quod consortium amisit, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matters of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See Chambers v. Caulfield, 6 East, 244; Wilton v. Webster, 7 C. & P. 198; Yundt v. Hartrunft, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass vi et armis, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." Rigaut v. Gallisard, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, Bac. Ab. Trespass, C. 1, and Marriage, F, 2; 2 Chit. Pl. (13th Am. Ed.) 855; Reeve's Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind,—that the corrupting of the body rather than the mind of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will.[4]

Exceptions sustained.

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[4] Accord: Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869 (1904). In Smith v. Myers, 52 Neb. 70, 71 N. W. 1006 (1897), the court, by Norval, J., said: "Complaint is made of this instruction, which was given by the court on its own motion: '(6) The jury are instructed that, if you find for the plaintiff, in estimating the injury he has sustained the jury may take into considera-

HOUGHTON v. RICE.

(Supreme Judicial Court of Massachusetts, 1899. 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351.)

Tort, by one woman against another for the alleged alienation by the defendant of the affections of the plaintiff's husband for her. The defendant demurred to the declaration, assigning as ground therefor that it did not set forth a legal cause of action. The Superior Court overruled the demurrer, and the defendant appealed. At the trial in that court, before Hammond, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which, Hammond, J., having ceased to be a justice of that court, were allowed by Sheldon, J. The facts appear in the opinion.

Lathrop, J. We do not think that the declaration in this case sets forth any cause of action at common law, if the action were by the husband against another man; and no statute of this Commonwealth gives the wife any greater right than the husband in cases of this nature. The acts charged are that the defendant did "ingratiate herself into the affections of the said William Houghton [the plaintiff's husband]; cause him incessantly to frequent her society; to give her various large sums of money; to execute to her various conveyances of property; to make large expenditures of money on her behalf; and to transfer to her, the said defendant, the courtesy and generosity, love and affection, previously bestowed by him upon the plaintiff as his said wife." It is then charged that by reason of these unlawful acts her husband ceased to have regard, respect, or affection for the

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tion the wounded feelings and affections of the husband, the wrong done to him in his domestic and social relations, the stain and dishonor he has sustained, and the grief and affliction suffered, in consequence of the act complained of, and give damages accordingly.' The elements of damages enumerated in this paragraph of the charge were proper subjects for the consideration of the jury in reaching a verdict, and it is an unfair criticism of this instruction, when read in the light of the remainder of the charge, to say that the court assumed plaintiff had sustained all those different items of damages. If the mere statement of the elements which the jury might consider in fixing the amount of recovery created an impression unfavorable to defendant, he is to blame for having so acted as to cause a judicial investigation of the facts. Plaintiff was not limited in the amount of recovery to such sum as would merely compensate him for loss of services of the wife during the time they were separated. Using the language of Chief Justice Walker in Yundt v. Hartrunft, 41 Ill. 12: 'In this class of cases the loss of services may be alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury.' See Stumm v. Hummel, 39 Iowa, 478; Long v. Booe, 106 Ala. 570, 17 South. 716; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607."

plaintiff, and became cross, irritable, ill-tempered, and penurious towards her, denying her suitable support and maintenance; was guilty of cruel and abusive treatment towards her; that his affections for her were wholly alienated from her, and her home and married state broken up and destroyed; that her husband, while living during certain months under the same roof with her, separated himself "virtually" from her, refused to live or cohabit with her as husband and wife, or to give her the benefit of his society, or to perform any of the duties due from him as her husband; but on the contrary for part of the year openly, and during the rest of the year secretly, lavished his property, society, love, and affection upon the defendant. It is further alleged that "by reason of the matters and things hereinbefore set forth" the plaintiff has suffered great pain and distress of mind and body, has lost her home, and the society and comfort of her husband, etc.

No adultery is alleged, and therefore the action is not for criminal conversation, where the allegation when a husband sues is that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affection in such a case is a mere matter of aggravation, and the loss of the wife's consortium is the actionable consequence of the injury. Adultery was the essential fact to be proved, and if this was not proved the action failed.

At common law, also, a husband could maintain an action against one who "persuaded, procured, and enticed his wife to continue absent and apart from him, and to secrete, hide and conceal herself from him, whereby during the time she continued absent he lost her comfort and society, and her aid and assistance in his domestic affairs." Lellis v. Lambert, 24 Ont. App. 653, 654. He could also maintain an action against one for receiving his wife and unlawfully harboring, concealing, and secreting her from him, and refusing to deliver her to him. In such cases adultery need not be alleged.

We do not see anything in the substantive allegations which brings the case within any form of action known to the common law. The case in this respect is like that of Lellis v. Lambert, ubi supra, 24 Ont. App. 653,—a case very similar to this, and where the whole subject-matter was ably considered by the Court of Appeals, the judges delivering their opinions seriatim. Judge Osler, on page 664, said: "The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her consortium, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing' or 'harboring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband."

In the case before us we are of opinion that the substantive allegations of the declaration do not state a cause of action, and that the demurrer should be sustained. See Evans v. O'Connor, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; Neville v. Gile, 174 Mass. 305, 54 N. E. 841. So ordered.[5]

OAKMAN v. BELDEN et al.

(Supreme Judicial Court of Maine, 1900. 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396.)

SAVAGE, J. Action on the case by husband for the alienation of the affections of his wife by her parents, who are the defendants. The plaintiff obtained a verdict.

The plaintiff claims that the defendants unjustifiably interfered in his domestic affairs, and with intent to break up the harmonious and affectionate relations existing between him and his wife, wrongfully enticed, advised and persuaded her to leave him, which she did. The defendants, on the other hand, deny that they persuaded their daughter to leave her husband, and they claim, in addition, that such was the daughter's age and condition of health, and such was the plaintiff's cruel and abusive conduct towards her, endangering her health and destroying her peace of mind, they were justified in doing all that the evidence for the plaintiff tends to show that they did, even assuming it to be true. It is admitted that the marriage was clandestine, and against the will of the defendants, and that the wife returned to their home not later than three weeks after the marriage, and has since remained there.

The jury were instructed that if the separation of the plaintiff's wife from him "was the result of the active interference of the parents," if they "put in their oar," and if "the wife would have gone back if it had not been for their interference, either by threats, persuasions or arguments, * * * they have done him a wrong, and he is entitled to compensation for that wrong." To this instruction the defendants except, and we are now to inquire whether this instruction was correct, in view of the evidence and the contentions of the parties.

Whoever wrongfully interferes in the relations of husband and wife, and entices the wife to leave the husband, is liable to him in damages. While a stranger may, without liability, harbor a wife who has left her husband, he may not persuade her to leave him, or not to return to him.

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[5] For a proper form of declaration in an action on the case at common law for alienation of the wife's affections, see Winsmore v. Greenbank, Willes, 577 (1745). It is not necessary to a cause of action by a husband for the alienation of his wife's affections that the wife should be enticed away from the house in which they live. Heermance v. James, 47 Barb. (N. Y.) 120 (1866); Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 385 (1884).

Though she may have just grounds for a separation, yet she may choose to return, and a stranger has no right to intermeddle, and if he does so voluntarily, he must answer the consequences. Modisett v. McPike, 74 Mo. 636. But it is universally conceded that a parent stands on different ground. Though the wife has gone out from the parental home, and has joined her husband "for better, for worse," and though she owes to him marital allegiance, and he possesses the first and the superior right to her affection and comfort and society, it is nevertheless true that the parental relation is not ended, nor has parental affection and duty ended. A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct towards her may be such as to endanger health, and entirely destroy peace and comfort, so that she may properly leave him. In such case, to whom shall she fly, if not to her parents? And from whom shall she seek advice if not from her parents? And such advice may, we think, be enforced by reasonable arguments. A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments, drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

This conclusion is supported by the authorities. Chancellor Kent in Hutcheson v. Peck, 5 Johns. (N. Y.) 196, said: "A father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. * * * I should require, therefore, more proof to sustain the action against the father, than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The quo animo ought then, in this case, to have been made the test of inquiry and the rule of decision."

In the well-considered opinion in Bennett v. Smith, 21 Barb. (N. Y.) 439, Strong, J., for the court, said: "When the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought, and I have no doubt have the right, not only to receive her into, and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. * * * And the same doctrine is applicable, in my judgment, to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives." White v. Ross, 47 Mich. 172, 10 N. W. 188; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

It was held in Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791, that "if the motive of the intervening person (a parent) was pure and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed." "Much will be forgiven the parents of a wife," the court say, "who honestly interfere in her behalf, though the interference was wholly unnecessary, and may have been detrimental to her interest and happiness as well as that of her husband; still when the motive was, not the protection of the wife, but hatred and ill will of the husband, it is no answer to his action that the offenders were his wife's parents." Rabe v. Hanna, 5 Ham. (Ohio) 530; Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784.

Some authorities seem to hold that the intent alone of the parent is decisive. In a recent Mississippi case it is said: "The question must always be, was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice, and in his action, he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have twelve men pass upon the integrity of his intentions." Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623.

"The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband. * * * If, however, the interference is by the parents of the wife, or an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible." Cooley on Torts (2d Ed.) p. 264.

After citing with approval the words of Chancellor Kent in Hutcheson v. Peck, supra, Mr. Schouler says: "But this does not justify even a parent in hostile interference against the husband; and the father must give up his daughter whenever she wishes to return, unless the proper tribunal has decided otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to persuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point rather than the justice of the interference." Schouler's Domestic Relations (3d Ed.) § 41.

In the instruction complained of in the case at bar, the jury were told in substance that if the separation of plaintiff's wife from him was the result of the active interference of the defendants, either by threats, persuasion, or arguments, then the defendants were liable. This instruction, unqualified as it was, was erroneous, and placed upon the defendants a much more grievous burden of justification than parents in such cases ought to be compelled to bear.

It is unnecessary to consider the remaining exceptions further than to say that we perceive no error in the rulings complained of.

Exceptions sustained.[6]

HARTPENCE v. ROGERS.

(Supreme Court of Missouri, 1898. 143 Mo. 623, 45 S. W. 650.)

This is an action for damages for alienating the affections of the plaintiff's wife and wrongfully causing her to abandon him. The testimony on behalf of the plaintiff tended to show a systematic and constant effort by the defendant to win the affections of the plaintiff's wife, to break the ties between her and her husband and cause her to abandon him. This testimony was substantially uncontradicted by the defendant. There was a verdict for the plaintiff. The defendant appealed.[7]

WILLIAMS, J. [after passing upon certain rulings upon evidence, continued:]

2. The first, third and fourth instructions for plaintiff contained a direction to the jury to find for him, if they believed from the evidence

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[6] Accord: Multer v. Knibbs, 193 Mass. 576, 79 N. E. 762 (1907); Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612 (1902); Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492 (1904); Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683 (1904); Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085 (1891). But see Smith v. Kaye, 48 Solicitor's Journ. 271, 20 T. L. R. 261 (1904).

[7] Statement abridged.

that defendant intentionally persuaded plaintiff's wife to separate and remain apart from him. These instructions contain other matters, which will be noticed later, but all of them include in substance the above direction. They are almost exact copies of those approved in Modisett v. McPike, 74 Mo. 636. It is argued by appellant that the jury, by these instructions, was authorized to return a verdict against defendant, upon the proof alone of the fact that he persuaded plaintiff's wife to leave him and separate herself from him, without reference to defendant's motives in so doing. It is said that a wife may have a good cause to abandon her husband and that a third party, in no manner related to her, may, from the best motive, persuade her to do so. This court answered a similar contention in the following language: "The wife may have a just cause for separation or divorce, but she may elect to abide by her situation and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife and if he voluntarily does so, he is amenable for the consequences. * * * No one unasked, especially a stranger, has the right to volunteer his advice or protection, and if he does so he is amenable. 'It is one thing to actively promote domestic discord, but quite another thing to harbor, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector.' It has been well said that 'such conduct, whatever the motive, is exceedingly perilous on the part of a stranger, generally open to misconstruction and never to be encouraged.'" Modisett v. McPike, 74 Mo. 646.

The principle announced in the instructions complained of, and in almost the same language, met with the approbation of the entire court in the case cited. We have no disposition to depart from that ruling. It is a safe rule to lay down, as this court has done, that a husband makes a prima facie case against a stranger when he shows that such stranger voluntarily and unasked intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence, as in this case, to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established, and the jury were properly so instructed. Modisett v. McPike, supra. The issues submitted in the instructions were included in the allegations of the petition. The fact that more was alleged than it was necessary for plaintiff to prove, in order to entitle him to a verdict, could not prevent his recovery, where he averred and proved enough to make out his case. Campbell v. Railroad, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Radcliffe v. Railroad, 90 Mo. 127, 2 S. W. 277. [Balance of opinion omitted.]

Judgment affirmed.

TASKER v. STANLEY.

TASKER v. TASKER.

(Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.)

HOLMES, J.[8] These are actions for procuring and enticing the plaintiff's wife to live separately from him. They are not actions of the type of Lynch v. Knight, 9 H. L. Cas. 577, brought for a slander in consequence of which his wife left him, but they are brought for persuasions which may have been based wholly upon the truth. That is all that is alleged in the declarations, and, so far as appears from the bill of exceptions, there was no evidence offered that the defendants spoke any falsehoods, or that their conduct was unlawful for any other reason than its tendency to produce a separation. Winsmore v. Greenbank, Willes, 577, 583.

True statements and honest advice would have done no harm but for the subsequent act of the wife, an independent and responsible person. The defendants had a right to deny their intent to bring about that act. See Robbins v. Fletcher, 101 Mass. 115, 117; Snow v. Paine, 114 Mass. 520; Commonwealth v. Damon, 136 Mass. 441, 449. And probably they would not be liable for it unless they intended it. See Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Hastings v. Stetson, 126 Mass. 329, 30 Am. Dec. 683; Jones v. Goodwillie, 143 Mass. 281, 9 N. E. 639; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49, 15 N. E. 84, 4 Am. St. Rep. 279; Elmer v. Fessenden, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724; Vicars v. Wilcocks, 8 East, 1, 3; Ward v. Weeks, 7 Bing. 211, 215; Radley v. London & Northwestern Railway, 1 App. Cas. 754, 759; Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Cuff v. Newark & New York Railroad, 35 N. J. Law, 17, 30, 10 Am. Rep. 205 et seq.

If the defendants did intend to induce a separation, they had a right to show that their advice was given honestly, with a view to the welfare of both parties. For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that, if she keeps away from him for three years, he may get a divorce. A married woman must be supposed to be capable of receiving advice to separate from her husband without losing her reason or responsibility. Considering the present state of the law as to the act advised, (an important consideration, State v. Goode, 1 Hawks [N. C.] 463, 464,) and as to the person to whom the advice is given, it is proper to allow a larger privilege than in the case of false statements. Good intentions are no excuse for spreading slanders. But in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases. Walker v. Cronin, 107 Mass. 555, 564, 566; Barnes v. Allen, 1 Abb. Dec. (N. Y.) 111; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Modisett v. McPike, 74 Mo. 636, 648; Rinehart v. Bills, 82 Mo. 534, 537, 52 Am. Rep. 385; Pollock, Torts (2d Ed.) 479, 480; Bowen v. Hall, 6 Q. B. D. 333, 338, 344; Lumley v. Gye, 2 El. & Bl. 216. * * *

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[8] Part of the opinion is omitted.

Exceptions overruled.[9]

II. UNDER THE FIRST MARRIED WOMEN'S LEGISLATION

JASSOY v. DELIUS.

(Supreme Court of Illinois, 1872. 65 Ill. 469.)

Mr Justice SHELDON delivered the opinion of the Court:

This was a creditor's bill, brought by the appellees against John Jassoy and A. B. Jassoy, his wife, to subject certain property, held in the name of the latter, to the payment of a judgment which had been recovered by the appellees against John Jassoy, the husband.

The court below rendered a decree against the defendants for the sum of $273.39 and costs. They appealed.

The proof shows that, in 1861, John Jassoy failed in business as a banker; that his dwelling house was sold at public sale by his assignee, subject to Jassoy's homestead right and a mortgage for $1000, and was afterwards purchased by his wife, A. B. Jassoy, who subsequently sold it for $2500, and after paying the mortgage on it of $1000, she purchased, in her own name, another house for $2200, where she and her husband now live.

In 1862, Mrs. Jassoy entered into the millinery business, which was successful, and she continued in it until in 1871. From the profits of this business she purchased a store in her own name for $4500. This house and store, together with about $1000 money at interest, she appeared to be possessed of at the time of the decree.

Aside from the profits of her millinery business, the proper separate estate which she ever had was only about $2100. The $2000 which she had at the time of her marriage, that being before the passage of the Married Woman's Act, so called, of 1861, belonged to her husband.

The profits arising from the conduct of the millinery business previous to the act of 1869, allowing to married women their earnings, at least all beyond the interest on the amount of the wife's separate capital which was employed, we think, must be regarded as the earnings of the wife, and, as such, be held to belong to the husband.

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[9] See Smith v. Kaye, 48 Solicitor's Journ. 271, 20 T. L. R. 261 (1904).

The proof shows, satisfactorily, that Mrs. Jassoy held, in her name, property of her husband to an amount at least equal to that found by the decree.

The decree must be affirmed.

Decree affirmed.[10]

NUDING v. URICH.

(Supreme Court of Pennsylvania, 1895. 169 Pa. 289, 32 Atl. 409.)

The fund in court is a portion of the proceeds of the sale under a fieri facias of said plaintiffs against said defendant of the stock and fixtures owned by defendant in a restaurant in the Lehigh Valley Railroad station building at Allentown, kept by defendant. Annie C. Urich, wife of defendant, by a sufficient notice, regularly given, claimed $108, alleged to be due her out of said business for wages, for services as a cook. The only question raised before the learned commissioner and in court is the legality of the contract made by said husband and wife for the payment of said wages.

The relevant facts found by the commissioner in the supplemental report and not disputed on exceptions, are: That on Aug. 1, 1893, defendant's manservant at the restaurant left, and he thereupon contracted with his said wife to take said servant's place—he offered to pay her the same wages he had paid to said servant—$3.00 a week; the wife accepted and did the work of a servant from said date to November 13th of that year, being 15 weeks, for which $45.00 is claimed. That at the time last aforesaid the man who had been employed as cook at $7.00 a week also left, and thereupon defendant and his wife made a new contract by which the latter in addition to her former work was to do the cooking for the restaurant and to receive for all such services $7.00 a week; that she did perform said services until Jan. 24, 1894, for which $63.00, is claimed; that nothing was paid; that during said period said parties lived together as husband and wife; that said contract was made in good faith; that the wages contracted for were reasonable, and the services rendered were worth the sum claimed.

The court finds to be a further fact what the commissioner states to be the testimony in the first report, that is: "That during these six months (for which compensation is claimed) Mrs. Urich and the children (of said husband and wife) took their meals or most of them at the restaurant, and that they also slept there, removing to the restaurant some of their household goods, and leaving the rest at their former residence on Lehigh street, that an adult daughter took care of the residence, that the same was at times occupied by the children, and that at other times they remained at the restaurant with their parents." The commissioners appointed to distribute the fund found that the wife's contract with the husband was invalid. Exceptions were filed and sustained and the claim of Annie C. Urich was allowed. Error assigned was in distributing the money to Annie C. Urich.[11]

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[10] Accord: Bear v. Hays, 36 Ill. 280 (1890); Farrell v. Patterson, 43 Ill. 52 (1892); Schwartz v. Saunders, 46 Ill. 18 (1892); Merrill v. Smith, 37 Me. 394 (1854); Lee v. Savannah Guano Co., 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243 (1896).

GREEN, J. If Mrs. Urich had been employed by a stranger to perform the same services that she rendered in this case, and for the same wages, and her husband had consented to such employment, the wages to be paid to her, there can be no doubt she would have had a valid legal title to the earnings, and could have sustained her claim against his will although he might subsequently have claimed the wages on the ground that he was the owner of her earnings as her husband. And the reason why she could recover them as against him would be because he had so contracted. In other words his legal right to her earnings in the absence of a contract, would be gone because of her contract made between him and her. Where he agreed that she might have the earnings he certainly forfeited any claim that he might otherwise have to them and thereby surrendered such claim to her. If now he makes a contract directly with his wife, that he, having occasion for extra and unusual service in the course of his business outside of his family relation and needs, will pay his wife for the performance of such service the special wages, which otherwise he would be obliged to pay to strangers, it is at least true that, so far as he is concerned, he has surrendered to his wife all claim to be the owner of her services, and therefore, of the compensation which he has agreed to pay her. His consent that she shall receive the compensation for the service, certainly divests the case of the aspect that he, as the owner of her services, and therefore of her earnings, is entitled to both against her will, and that element of the contention is removed from the argument. What then is left? Nothing but the proposition that a husband and wife cannot make such a contract. Why not? There is nothing in the act of 1893 which gives her a contracting power that denies or restrains her right to contract with her husband. The second section of the act (P. L. 344, Act June 8, 1893) provides that "Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section" (section 1), but she may not become accommodation indorser, nor execute a deed without joining her husband. Here is a very large contracting power conferred with only special restrictions which do not embrace the pending question. Within her limitations a married woman may contract to the same extent, and in the same manner as an unmarried person. The first section defines the subjects of her contracting power thus: "that hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property real, personal or mixed, and either in possession or expectancy," etc.

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[11] Statement abridged.

The word "earnings" does not appear in this act, but as personal services are a species of personal property, it would seem they may be sold, and as earnings represent in common speech the reward for such services, whether in money or chattels, it would seem that they may be "acquired," or "owned," or "possessed," within the fair meaning of the section.

In Lewis' Estate, 156 Pa. 337, 27 Atl. 35, we held that, under the act of 1887, the earnings of a married woman were a species of property and belonged to her and not to her husband, and we all agreed that she should have them, where they were the reward of her personal service; her title to them was absolute, and she could recover them in an action without joining her husband. We do not think the act of 1893 was intended to restrain the meaning of the act of 1887, but to stand as a substitute for it, and with power and authority, and contracting capacity of married women, at least equal to that which was conferred by the act of 1887.

The word "acquire," in the act of 1893, we think includes everything that would be included in the word "earned" in the act of 1887. A reading of the two acts together indicates clearly that the later one was intended to remove some doubts about the construction of the first, and to place the rights and powers of married women upon a broader, more comprehensive and better defined basis than was accomplished by the act of 1887. The title of the act of 1893 expressly states as one of the objects of the act, the "enlarging her capacity to acquire and dispose of property."

In the present case everything that could be done was done by the husband to enable the wife by her own personal service to acquire for herself alone the reward of that service, and no rights of his, independent of contract, are in the way of her recovery. We agree with the learned court below in the views expressed upon this subject and therefore affirm the decree.

Decree affirmed and appeal dismissed at the cost of the appellants.

WILLIAMS and MITCHELL, JJ. We dissent from this judgment. If it be conceded that the alleged contract is good between the parties it is not good as against the husband's creditors.

III. Under Acts Giving Married Women Their Earnings

Laws Ill. 1869, p. 255: "A married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors: Provided, this act shall not be construed to give to the wife any right to compensation for any labor performed for her minor children or husband." [12]

ATCHISON, T. & S. F. R. Co. v. DICKEY.

(Court of Appeals of Kansas, 1895. 1 Kan. App. 770, 41 Pac. 1070.)

Cole, J.[13] This was an action brought in the district court of Finney county, Kansas, by T. M. Dickey, as the husband of Jane Dickey, in which he seeks to recover from the railroad company for alleged loss of services consequent upon the injury of Jane Dickey through the negligence and carelessness of said company. There was a verdict and judgment for the plaintiff below, and the railroad company brings the case here for review.

The petition alleges that for a long time previous to the 29th day of October, 1888, and at the time of filing said petition, the plaintiff and Jane Dickey were husband and wife. It then alleges the corporate existence of the defendant company under the laws of the state of Kansas, and that said company was engaged in the business of operating a railroad and carrying passengers for hire upon its cars in the states of Kansas and Colorado; that on or about the 29th day of October, 1888, Jane Dickey purchased from defendant's agent at Garden City, in the state of Kansas, a ticket from Garden City to Pueblo, Colo., and entered one of the regular passenger cars provided by the defendant for transporting passengers from Garden City to Pueblo, and that she remained in said car until the train reached the town of La Junta, Colo., at which point, it is alleged, she was requested by the agent of the defendant to leave said car and enter another; that while she was endeavoring to comply with said request, and while upon the steps, the said car was, by the servants of the defendant negligently and without any warning, suddenly and violently moved, by which she was thrown to the ground between the platform and the track, and that while in such position she was by the motion of the car bruised and lacerated, and that the bones of her lower leg and ankle were crushed, and that by reason of such fall and injuries and the fright occasioned thereby her nervous system was severely shocked; that the injuries complained of were permanent, greatly impaired the use of the limb so injured, and rendered her a permanent cripple. The petition then alleges that by reason of such injuries so inflicted on his wife the plaintiff has been compelled to expend large sums of money for medical attendance, medicine, and nursing, and for other purposes in caring for her during the illness caused by said injury, and that by reason of the nature and permanent character of the injuries so inflicted upon his wife, plaintiff has been and will be put to great expense for the proper care of his wife, and has been and will be deprived of her services, to his damage in the sum of $5,000, for which sum he prays judgment.

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[12] The effect of the proviso has been retained under some decisions, although the act which allowed the married woman her earnings did not explicitly save the husband's right to her personal services. Thus in a suit for personal injuries inflicted upon the wife she could not recover for her loss of time in serving her husband in his trade. Blaechinska v. Howard Mission, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215 (1892). So, where the husband sued for his loss of services by reason of damage to the wife, he was entitled to recover the value of her personal services to him. Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618 (1875); Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 South. 363, 109 Am. St. Rep. 40 (1904). But the husband can no longer recover for damage to him because his wife cannot work at her trade when she is entitled to her own earnings in that trade. Riley v. Lidtke, 49 Neb. 139, 68 N. W. 356 (1896). But the married woman herself can do so. Harmon v. Old Colony, 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499 (1896); Texas Ry. Co. v. Humble, 97 Fed. 837, 38 C. C. A. 502 (1899).

[13] Parts of the opinion omitted.

To this petition the defendant railroad company filed its general demurrer, which was by the court overruled, which ruling is assigned as the first error in this case. The grounds urged by counsel for plaintiff in error, upon which it is claimed the demurrer should have been sustained are: (1) That the petition should have alleged not only that the plaintiff and Jane Dickey were husband and wife at the time the injuries were alleged to have been received by her and at the time the action was commenced, but should also show that the plaintiff and Jane Dickey lived and cohabited together during such time, and that such actual relations existed between them as would indicate that plaintiff was entitled to her services. (2) That the petition shows that the injuries were received in the state of Colorado, and fails to show that this action could have been maintained in the state of Colorado, and it must appear in the petition that the injury was actionable in Colorado, where it occurred, before the action could be maintained for such injury in the state of Kansas. [The Court here held that the second proposition was without merit and then proceeded to consider the first as follows:]

The other objection raises a more serious question. It is true, that the rule formerly was that hsuband and wife are one person, and that he has the exclusive right to the labor, services and earnings of the wife, and, if this rule still obtains, it follows as a natural result that an allegation of the marital relation would be sufficient. But, this old rule has been radically and we think wisely changed. Many of the restraints and disabilities of coverture have been removed by positive legislative enactment, so that to-day, in this state, a married woman may carry on any trade or business, perform any labor or service, and her earnings from said trade or business, labor or service, are her sole and separate property, and she may sue both to protect and enforce her rights in the same manner as if she were unmarried. It follows from this, as was said in an opinion delivered by Mr. Justice Johnston, in City of Wyandotte v. Agan, 37 Kan. 530, 15 Pac. 529, "that the time and services of the wife did not necessarily belong to the husband, nor does an injury which causes the loss of such time and service necessarily accrue to him. At least a portion of her time may be given to the labor or business done on her sole and separate account. The profits or earnings of such labor or business are her sole and separate property, and cannot be appropriated or controlled by her husband without her consent. So far, then, as she is deprived of these she suffers a loss which is personal to herself, for which she alone can recover. The fact that she is partially or wholly dependent upon the husband for support does not abridge her right of action, nor transfer to him that which accrued solely to her." * * *

From the doctrine announced in these two cases it plainly appears that a pleading which simply alleges the marital relation does not tender an issue as regards the services of the wife, either as a cause of action or as a defense. Nor do we think that the further allegation contained in the petition in this case that by reason of the injuries complained of the plaintiff "has been and will be deprived of her services," is sufficient to remedy this defect. This latter allegation is a statement of a conclusion alleged by the pleader to be the natural result of the injuries sustained, and not the result of any relationship existing between the plaintiff and the injured party by reason of which plaintiff was entitled to such services. It could only have the force contended for by the defendant in error by invoking the aid of the old rule of law which the later decisions and statutory enactments have so radically changed. Upon the first objection urged by the plaintiff in error the demurrer should have been sustained.

[Remainder of opinion omitted.]

Judgment reversed and cause remanded for further proceedings in accordance with this opinion. All the Judges concurring.

KELLEY v. NEW YORK, N. H. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397.)

Tort, to recover consequential damages arising from personal injuries to the plaintiff's wife, Mary J. Kelley, occasioned by the defendant's negligence. Trial in the Superior Court, before Dewey, J., who allowed a bill of exceptions, in substance as follows:

This action was tried at the same time with an action brought by the plaintiff's wife to recover for injuries which she herself had suffered.

There was evidence tending to show that on October 23, 1894, the plaintiff's wife, while a passenger on a train of the defendant, was injured; and the defendant admitted that her injuries were caused by the negligence of its servants, and that she was at the time in the exercise of due care.

There was also evidence tending to show that the plaintiff's wife, prior to the accident, had been in good health, and had done the housework, cooking, and washing in the plaintiff's household, and had taken the entire care of two children; that in the accident referred to she had suffered a fractured shoulder blade, an injury to her womb causing a retroversion and pain for some time, and numerous severe bruises; that after the injury she had returned to the plaintiff's home, and for five or six weeks had had one arm bandaged, and had been unable for a considerable length of time to do any work about the plaintiff's house, and because of her injuries had been compelled to wean her child, which she was then nursing; that her capacity to work was permanently impaired, and she had been made irritable, pallid, thin, and weak; and that since the accident she had continued to live with the plaintiff, and on October 21, 1895, had borne him a child; and there was no evidence, other than reasonable inferences from the foregoing facts, that any change had occurred in their relations toward one another as husband and wife. There was further evidence that the plaintiff had incurred expenses for medical attendance, nursing, and medicine for his wife, to the amount of over $1,000.

At the close of the evidence, the defendant requested the judge to rule as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. The division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover."

The judge declined to give the first ruling requested, but gave the second, with the qualification that one additional element should be considered, namely, the loss of consortium by the husband; and the defendant excepted.

The judge also instructed the jury that, although the wife's time and capacity to earn were her own, yet there was a residuum to which the husband was entitled which could best be defined by the word consortium, meaning fellowship, society, or communion, for the loss of which he alone was entitled to recover; and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of $616; and the defendant alleged exceptions.

Allen, J. In Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss or loss of service.

The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover, which by law is made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or at least that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action.

It might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled; but in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it.

By the common law it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her, by medical or surgical malpractice, or by other negligence. Hyde v. Scyssor, Cro. Jac. 538; Guy v. Lusy, 2 Rol. R. 51; Russell v. Corne, 2 Ld. Raym. 1031; Dix v. Brookes, 1 Stra. 61; Smith v. Hixon, 2 Stra. 977; 2 Rol. Abr. Trespass, (Y) 16, p. 556; Hale's Anal. of Law, 96; 3 Bl. Com. 140; 1 Chit. Pl. (7th Ed.) 83; Yelv. (Met. Ed.) 89; Baker v. Bolton, 1 Camp. 493; Carey v. Burkshire Railroad, 1 Cush. (Mass.) 475, 478, 48 Am. Dec. 616; Barnes v. Hurd, 11 Mass. 59; Laughlin v. Eaton, 54 Me. 156; Hopkins v. St. Lawrence Railroad Co., 36 N. H. 9, 14, 72 Am. Dec. 287; Lewis v. Babcock, 18 Johns. (N. Y.) 443; Matteson v. New York Central Railroad Co., 35 N. Y. 487, 91 Am. Dec. 67; Jones v. Utica & Black River Railroad Co., 40 Hun, 349 (a case much like the present); Berger v. Jacobs, 21 Mich. 215; Hyatt v. Adams, 16 Mich. 180; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Nixon v. Ludlam, 50 Ill. App. 273; Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Mowry v. Chaney, 43 Iowa, 609; Smith v. City of St. Joseph, 55 Mo. 456, 17 Am. Rep. 660.

The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this Commonwealth increasing the rights of married women. Harmon v. Old Colony Railroad Co., 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499. But there has been no substantial change in the statutes upon this subject since the decision in Bigaouette v. Paulet. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired. Butler v. Ives, 139 Mass. 202, 29 N. E. 654. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain different duties and obligations towards each other, in sickness and health, which it cannot be supposed that the Legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes. Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618. These duties are included in the word "consortium"; but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is, whether the presiding justice was right in allowing the jury to consider at all the loss of consortium.

It is argued by the defendant, that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at common law; but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony. Exceptions overruled.[14]

[14] Accord: Cullar v. Missouri, K. & T. Ry. Co., 84 Mo. App. 347 (1900); Lyons v. New York City R. Co., 49 Misc. Rep. 517, 97 N. Y. Supp. 1033 (1906). Observe, however, that in Bolger v. Boston El. Co., 205 Mass. 420, 91 N. E. 389 (1910), the Massachusetts court (relying upon Feneff v. New York Cent. Ry., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. [N. S.] 1024, 133 Am. St. Rep. 291 [1909], post, p. 392), held the husband entitled to no damages whatever for loss of consortium, but only for damages for medical expenses.

SECTION 2.—THE WIFE'S RIGHT

NOLIN v. PEARSON.

(Supreme Judicial Court of Massachusetts, 1905. 191 Mass. 283, 77 N. E. 890, 4 L. R. A. [N. S.] 643, 114 Am. St. Rep. 605.)

Tort for alleged criminal conversation with the plaintiff's husband. Writ dated March 18, 1905.

The declaration was as follows:

"1st Count. And the plaintiff says the defendant, contriving and wrongfully intending to injure the plaintiff and to deprive her of the comfort, society, aid and assistance of Philip Nolin, the husband of the plaintiff, and to alienate and destroy his affection for her, heretofore, viz. on or about the 10th day of December, 1904, and on or about the 17th day of December, 1904, and on or about the 27th day of January, 1905, and on or about the 4th and 5th days of February, 1905, and on or about the 18th day of March, 1905, and on divers other days and dates between said 10th day of December, 1904, and said 18th day of March, 1905, to said plaintiff unknown, wrongfully and wickedly debauched and carnally knew the plaintiff's said husband, he being then and ever since the husband of the plaintiff, by means whereof his affection for the plaintiff was wholly alienated and destroyed, and by reason of the premises, the plaintiff has wholly lost the comfort, society, aid and assistance of her said husband, which during all the time aforesaid she might and ought to have had.

"2d. Count. And the plaintiff further says the defendant contriving and wrongfully intending to injure the plaintiff and to deprive her of the comfort, society, aid and assistance of Philip Nolin, the husband of the plaintiff, and to alienate and destroy his affection for her, unlawfully and unjustly gained the affections of her said husband, and persuaded, procured and enticed her said husband to leave the house of the plaintiff and to continue absent from the same, by means of which persuasion and enticement he did continue absent for a long period of time and up to the bringing of this suit, whereby the plaintiff lost the company, society, aid and assistance of her said husband, and his affection for the plaintiff was wholly alienated and destroyed."

The defendant demurred to the declaration. In the Superior Court, Gaskill, J., sustained the demurrer and ordered judgment for the defendant. The plaintiff appealed.

BRALEY, J. The early common law recognized and upheld the doctrine that for most purposes husband and wife formed a single person, represented by the husband, and as a consequence of this legal merger it has been said: "That is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. * * * Upon this principle, of the union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage," and "the wife * * * hath no separate interest in anything during her coverture." 1 Bl. Com. (Sharswood's Ed.) 442, 445; 3 Ibid. 143. Or, as pointedly and accurately stated in Dixon v. Amerman, 181 Mass. 430, 431, 63 N. E. 1057, with a reference to the early English authorities, the wife was considered the husband's chattel.

Personal property in her possession upon marriage passed to him, and could be levied upon for his debts, or bequeathed by him to strangers, and he also took during coverture a sole estate in her lands which she could not alien unless he joined, or devise even with his assent, unless when exercising a power granted to her at the creating of the estate, nor derive any benefit or income therefrom by any contract which she could make separately. Hanlon v. Thayer, Quincy, 99, 1 Am. Dec. 1; Fowler v. Shearer, 7 Mass. 14; Legg v. Legg, 8 Mass. 99; Osgood v. Breed, 12 Mass. 525; Lowell v. Daniels, 2 Gray, 161, 168, 61 Am. Dec. 448; Hawkins v. Providence & Worcester Railroad, 119 Mass. 596, 20 Am. Rep. 353; Washburn v. Hale, 10 Pick. 429; Clapp v. Stoughton, 10 Pick. 463, 468, 469; Ames v. Chew, 5 Metc. 320; Gerry v. Gerry, 11 Gray, 381; Bartlett v. Cowles, 15 Gray, 445, 446.

Without her consent damages for injury to her person or reputation also might be released by him, or if collected in her lifetime they became his separate property, and as a husband he had the right moderately to chastise his wife, it was declared by the Colony in 1641 that she should be free from corporal correction by him. Southworth v. Packard, 7 Mass. 95; Kelley v. New York, New Haven & Hartford Railroad, 168 Mass. 308, 311, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited; Phillips v. Barnet, 1 Q. B. D. 436, 438; Bac. Abr. Baron & Feme (B); Col. Laws Mass. 1660 (Whitmore's Ed.) 51. See Commonwealth v. McAfee, 108 Mass. 458, 11 Am. Rep. 383.

While the common law prevails in this Commonwealth except so far as it may have been modified by statute, it is obvious from this brief reference to some of its provisions that the development of modern society would imperatively call from time to time for the modification or abrogation of many if not all of these archaic conditions. Dunn v. Sargent, 101 Mass. 336, 338; Cooley, Const. Lim. (7th Ed.) 484, 485. Beginning with St. 1842, p. 527, c. 74, and by subsequent statutory enactments, the separate legal existence of a married woman as to her right to hold and dispose of property both real and personal as well as the right to her person has been gradually recognized and established. St. 1845, p. 531, c. 208; St. 1846, p. 139, c. 209; St. 1855, p. 710, c. 304; St. 1857, p. 598, c. 249; Gen. St. 1860, c. 108; St. 1864, p. 255, c. 276; St. 1868, p. 82, c. 95; St. 1869, p.

703, c. 409; St. 1871, p. 655, c. 312; St. 1874, p. 117, c. 184; Pub. St. 1882, c. 147; Rev. Laws, cc. 153, 140.

This remedial legislation has resulted in very largely impairing the unity of husband and wife as it existed at common law. Butler v. Ives, 139 Mass. 202, 203, 29 N. E. 654; Bradford v. Worcester, 184 Mass. 557, 561, 69 N. E. 310.

It must also be taken as settled that for the purposes of divorce, of separate maintenance, or of public charitable relief she may have a separate domicile, and is absolutely entitled to her personal liberty and earnings, with a corresponding liability for her debts and contracts and for torts committed by her or by her husband under her direction. Osgood v. Osgood, 153 Mass. 38, 26 N. E. 413; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Bradford v. Worcester, ubi supra; McCarty v. De Best, 120 Mass. 89; Shane v. Lyons, 172 Mass. 199, 200, 51 N. E. 976, 70 Am. St. Rep. 261.

If the husband still is recognized as nominally the head of the family, and as such may determine their common residence, for the proper conduct of which he may be responsible under the criminal law, his control over the person or property of his wife has been reduced to a minimum, if it has not entirely disappeared. Harmon v. Old Colony Railroad, 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 St. Rep. 499; Kerslake v. Cummings, 180 Mass. 65, 68, 61 N. E. 760; Bradford v. Worcester, ubi supra.

But he retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce, and he may recover damages for loss of consortium when caused by injuries to her person through the wrongs of others, as well as for criminal conversation with her. Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Bigaouette v. Paulet, 134 Mass. 123, 126, 45 Am. Rep. 307; Kelley v. New York, New Haven & Hartford Railroad Co., ubi supra.

In Kelley v. New York, New Haven & Hartford Railroad Co., while recognizing this right in the husband, it was stated in the closing paragraph of the opinion that the wife had no corresponding right which she could enforce at common law, but whether she had by statute was left undecided. The question then left open is now presented for our decision.

When approached in the light of an abstract right arising from and incidental to the civil institution known as marriage, but which as between the parties is treated as a contract, and the consequent conjugal relation, there is great inherent difficulty in sustaining the proposition that, while the husband can demand the right of exclusive marital aid and affection, the wife has no equivalent right, or that a sound public policy requires that she shall remain faithful to her marriage obligations, although he is at liberty to enter upon a course of conduct which may render further marital relations on her part impossible.

By the contract each spouse is entitled to the conjugal society and comfort of the other, and this association is one of the mutual obligations growing out of the union of husband and wife. The affection and comfort which each is supposed to derive from the society of the other springs from the joint relation, and is as valuable and important to her as to him. The case of Lynch v. Knight, 9 H. L. Cas. 577, is not an authority to the contrary, as that was a suit for slander brought by the wife who joined the husband for conformity, and the words spoken of her not being actionable in themselves, the special damage alleged was that in consequence of the slander she had been compelled by her husband to leave his house, with the consequent loss of his conjugal society. While the decision was placed upon the ground that the act of the husband was not such a natural and probable result of the words spoken as would make the defendant liable in damages, the question whether the right of consortium was confined to the husband alone although discussed was left undecided. In the judgments of Lord Chancellor Campbell and Lord Cranworth both were inclined to the view that this right was not limited to the husband, but extended to the wife, while Lord Wensleydale was of opinion that such a right on her part did not exist. Its existence, however, has always been recognized and enforced by the ecclesiastical courts in a suit by her for the restitution of conjugal rights, where in defense nothing less than conduct which would be sufficient to entitle the respondent to a judicial separation was a bar to the relief sought. Orme v. Orme, 2 Add. Eccl. 382. 1 Bish. Mar., Div. & Sep. §§ 69, 1357. Burroughs v. Burroughs, 2 Sw. & Tr. 303.

The absolute privilege of each to the conjugal society of the other must be considered as embracing the persons of both, with no distinction in favor of one as against the other, and this equal companionship and aid in the founding and maintenance of the home and in the rearing of offsprings is the foundation upon which this most important of all the domestic relations rests. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Smith v. Smith, 98 Tenn. 101, 105, 38 S. W. 439, 60 Am. St. Rep. 838.

At common law because the debauching or seduction of the wife was an "invasion of his exclusive right to marital intercourse * * * and the right to beget his own children," the husband was allowed to maintain an action for the loss of such aid, comfort, and society as she would be expected to bestow upon him, although there might be no impairment of her services or assistance in the sense that she performed labor in the management or supervision of his household. Hadley v. Heywood, 121 Mass. 236; Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307, ubi supra; Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Evans v. O'Connor, 174 Mass. 287, 291, 54 N. E. 557, 75 Am. St. Rep. 316; Houghton v. Rice, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351. But it was early recognized that if the wife was enticed away, and abandoned her husband, or was subjected to physical violence whereby she became disabled, he could sue for damages suffered by him from the wrongdoer, and either action could be maintained independently of proof of her adultery. 2 Bl. Com. (Sharswood's Ed.) 139; Hyde v. Scyssor, Cro. Jac. 538; Winsmore v. Greenbank, Willes, 577; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Crocker v. Crocker (C. C.) 98 Fed. 702.

In England by the "Matrimonial Causes Act," St. 20 & 21 Vict. c. 85, § 59, the common-law action for criminal conversation has been abolished, yet by sections 28 and 33 the husband may on a petition against the adulterer alone, or upon joining him as corespondent in a petition against his wife for dissolution of the marriage, recover damages to be assessed by a jury as in an action at law. Comyn v. Comyn and Humphries, 32 L. J. (N. S.) P. & M. 210; Bernstein v. Bernstein, 69 L. T. (N. S.) 513. Under this act there has been no abrogation of the husband's right of action against the adulterer, but only a change as to the form of remedy. Pomero v. Pomero, L. R. 10 C. P. D. 174; Eversley, Domestic Relations (2d Ed.) 170, 171. It also leaves unaffected his cause of action for enticing his wife to abandon him, or to recover for loss of consortium when caused by physical injury to her person.

By St. 1874, p. 117, c. 184, § 3, now Rev. Laws, c. 153, § 6, the disability of coverture, exclusive of suits between husband and wife, has been removed, and since the first enactment she has been liable to be sued, and might bring suit in the same manner as if sole. In consequence of this broad and comprehensive language she became, so far as civil procedure is concerned, discovert as to all persons except her husband, and whenever injured in her person or estate a married woman may bring suit in her own name against the wrongdoer for damages suffered, which upon recovery become her exclusive property. Jordan v. Middlesex Railroad Co., 138 Mass. 425; Lombard v. Morse, 155 Mass. 136, 140, 29 N. E. 205, 14 L. R. A. 273; Harmon v. Old Colony Railroad Co., 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499, ubi supra.

The loss of the essential element of matrimonial fellowship afforded by the husband's society and exclusively given to her by the contract of marriage, when accomplished by his seduction at the inducement of another woman is an injury as tangible and from which she may suffer as acutely and with more disastrous consequences to herself than from loss of reputation caused by libel or slander in which compensatory damages for mental suffering may be assessed; or from the injury, if under Rev. Laws, c. 153, § 10, she is engaged in business on her separate account, that may follow from malevolently depriving her of possible custom, when such a result is accomplished otherwise than by fair competition; or from the wrong caused by the violation of contracts of service between her and those she employs where a breach by the servant is induced without justifiable cause by the intentional acts of strangers, although in all of these instances the law gives to her an ample remedy. Hastings v. Stetson, 130 Mass. 76; Walker v. Cronin, 107 Mass. 555; May v. Wood, 172 Mass. 11, 15, 51 N. E. 191; Moran v. Dunphy, 177 Mass. 485, 487, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Temperton v. Russell, [1893] 1 Q. B. 715.

Our statute, as we have said, is expressed in the broadest terms. It permits a recovery by a married woman not only for injury in any form done to her person or property, but for damages which flow from a wrong suffered from a violation of personal rights. The allegations of the declaration disclose not only the commission of a felony, but all the elements of a wrongful act deliberately done for the purpose of working an injury to the plaintiff, and which actually has been accomplished. Rev. Laws, c. 212, § 10; chapter 215, § 1; Morasse v. Brochu, 151 Mass. 567, 574, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474.

If the duty of keeping his marital covenant rested on the husband, who has failed to perform it, none the less the plaintiff had a right to be protected from the intended unlawful acts, and willful interference of the defendant. Winsmore v. Greenbank, ubi supra; Plant v. Woods, 176 Mass. 492, 498, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Tasker v. Stanley, ubi supra. See Moran v. Dunphy, ubi supra; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. D. 333; Aikens v. Wisconsin, 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154.

The defendant admits by her demurrer that she purposely persuaded and enticed the plaintiff's husband to commit adultery, and to refuse performance of his marital obligations, and also induced him to abandon his home, and his wife, and by these means the possession of his companionship conferred upon the plaintiff by the contract of marriage has been lost and destroyed. This is distinctly a wrong because depriving her of the consortium of her husband, for which she can by force of our laws maintain an action, without joining him as a party plaintiff, and the damages suffered when recovered are her separate property.

That no precedent of this court is found for the present action, which is of first impression, is not conclusive against the plaintiff, and is of little weight. If she has suffered an injury intentionally inflicted, followed by damage, she ought not to be remediless unless relief is refused by reason of an absolute legal prohibition, which we do not find. Hastings v. Livermore, 7 Gray, 194, 197; Rice v. Coolidge, 121 Mass. 393, 397, 23 Am. Rep. 279.

We are aware that in a few jurisdictions either from the construction of enabling statutes, which are held to confer upon a married woman only the right to sue for injuries to her person or for damages to her property, or for reasons of public policy, a cause of action for criminal conversation with her husband has been denied. See Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; Hodge v. Wetzler, 69 N. J. Law, 490, 55 Atl. 49; Lellis v. Lambert, 24 Ont. App. 653; Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; Morgan v. Martin, 92 Me. 190, 42 Atl. 354.[15] But the conclusion to which we have come is supported by the great weight of American authority. Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; Hart v. Knapp, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, ubi supra; Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; Warren v. Warren, 89 Mich. 123, ubi supra; Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; Brown v. Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; Smith v. Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838, ubi supra; Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 52 L. R. A. 630, 78 Am. St. Rep. 303; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. Rep. 468; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577; s. c. 147 Mo. 387, 48 S. W. 947; Mehrhoff v. Mehrhoff (C. C.) 26 Fed. 13; Waldron v. Waldron (C. C.) 45 Fed. 315; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Price v. Price, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; King v. Hanson, 13 N. D. 85, 99 N. W. 1085; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98.

Judgment reversed. Demurrer overruled.[16]

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[15] See, also, to the same effect, Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961 (1903).

[16] Accord: Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646 (1898); Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784 (1897); Keen v. Keen, 49 Or. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504 (1907); Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075 (1900); Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102 (1900).

KROESSIN v. KELLER.

(Supreme Court of Minnesota, 1895. 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533.)

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan, and similar to our own, is Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add Price v. Price, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with little hope of redress for themselves." We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. St. 1894, § 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Order reversed.[17]

HART v. KNAPP.

(Supreme Court of Errors of Connecticut, 1903. 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989.)

Action by Celia Hart against Anna C. Knapp. The complaint among other things alleges in substance that prior to its date the defendant had alienated the affections of Hart, plaintiff's husband, committed adultery with him, caused him to abandon the plaintiff, and had ever since lived in adultery with him. The evidence for the plaintiff tended to prove all the allegations of her complaint. There was some evidence tending to disprove the facts alleged. On behalf of the defendant two requests for instructions were made in substance as follows: If the jury find "that the defendant did not seduce the plaintiff's husband, but, upon the contrary, that the plaintiff's husband seduced the defendant, then the plaintiff cannot recover." If the jury find that the defendant was not the "active or aggressive party who brought about the adulterous intercourse between herself and the plaintiff's husband," but that "the defendant was the victim of the wiles, blandishments, and intrigues of plaintiff's husband," the plaintiff cannot recover.[18]

Torrance, C. J. [after stating the case and setting out the two requests for instructions above given, said:]

The only errors assigned on this part of the case relate to the action of the court in refusing to charge the two requests last above mentioned. It may, perhaps, be doubted whether there was sufficient evidence in the case to justify the defendant in making these requests. Certainly the record discloses very little evidence of that kind.

The evidence for the plaintiff tended strongly to show that the defendant "was an active or aggressive party" in bringing about the state of things complained of by the plaintiff, while apparently the only evidence to the contrary was that of the husband to the effect "that any affection that might exist on the part of the defendant" for him "was begun and prolonged" by him. For the purposes of discussion, however, we will assume that there was evidence of the kind in question before the jury.

[17] Churchill v. Lewis, 17 Abb. N. C. (N. Y.) 226 (1886); Waldron v. Waldron (C. C.) 45 Fed. 315 (1890).

[18] Statement abridged from the opinion.

The plaintiff claimed to have proved her case, and, if that claim was sustained by the jury, she was entitled to recover in this action. Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258. Her case was based upon these facts: That the defendant had committed adultery with Hart, had thereafter continuously lived in adultery with him at her home, and had thereby won his affections from the plaintiff and caused him to abandon her. To meet this case the defendant in these requests asked the court to say to the jury that if the husband seduced her, and she was the victim of his wiles, that would be a complete bar to this action, and the question is whether this is so.

The question is one of first impression in this state, and, so far as we are aware, it has not been passed upon elsewhere in a case just like the present, and must therefore be determined upon principle rather than precedent. The lack of precedent is not surprising. The right of the injured wife to bring an action of this kind was not recognized in any of the states until recently, and is still denied in many of them. Our own case of Foot v. Card, supra—one of the pioneer cases of this kind—was decided in 1889. We are of opinion that the facts assumed in the requests, even if true, constitute no bar to the plaintiff's action. The defense embodied in the requests is based upon the hypothesis that the defendant is guilty of the things charged against her. She thus hypothetically admits that she committed adultery with Hart, has long lived in adultery with him at her home, and that, as a result of this, Hart has abandoned his wife for her. She was a widow, of full age, with full knowledge that Hart was the husband of the plaintiff. She hypothetically admits that she engaged with him in a great wrong to the plaintiff. She knew that her course of conduct with him probably would lead him to abandon his wife. "There can be no surer means adopted to estrange husband and wife, and stifle all affection that ever existed between them, than the existence of improper relations, especially of a criminal nature, between one of them and another party." Shufeldt v. Shufeldt, 86 Md. 525, 39 Atl. 416.

She now claims, in effect, that, because the husband seduced her, she is absolved from liability for her own wrongs against the wife. The word "seduce," when used with reference to the conduct of a man towards a woman, is "universally understood to mean an enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him." State v. Bierce, 27 Conn. 319. When, therefore, the defendant says that the husband seduced her, that is merely saying that he first solicited, enticed, and persuaded her to adulterous intercourse with him, and that she yielded to his persuasion. She yielded to him first, and then continued to live in adultery with him at her home, although, for aught that appears, she might easily have gotten rid of him, had she chosen to do so. In what she did with the husband she did with full knowledge that it was wrongful, and that it would, as the plaintiff claims it did, result in harm to the plaintiff.

The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion. Solicitation, persuasion, enticement, temptation, however urgent, powerful, or alluring, do not constitute duress. In law, so far as regards the plaintiff, what the defendant did with Hart, she did of her own free will; and she is responsible to the wife for the results of her conduct with the husband, even if it be true that he persuaded her to do what she did, and "was the active or aggressive party" in procuring her to do so.

In actions for criminal conversation, at common law, the fact that the wife was, so to speak, the seductress, was of no avail as a defense (Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; Bigaouette v. Paulet, 134 Mass. 125, 45 Am. Rep. 307; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Moore v. Hammons, 119 Ind. 510, 21 N. E. 1111; Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533), although in some cases it has been admitted as bearing upon the quantum of damages (Sieber v. Pettit, 200 Pa. 58, 49 Atl. 763).

Some of the reasons given for applying such a rule in such actions may not exist in actions brought by the wife to vindicate her right to the society and affections of her husband, but it is difficult to see why an analogous rule should not be applied in a case like the present to the defense that the husband was the seducer. It may be that in cases like that of Kroessin v. Keller, supra—an action by a married woman against one of her own sex simply for an act of adultery with the husband, and alleging neither alienation of his affections, nor neglect nor abandonment of the plaintiff—the fact that the husband was the seducer should be held to be a defense, as is suggested in that case; but we have no occasion here and now to decide such a question, for the case at bar is not at all like the Minnesota case. Upon principle, we think the facts set up in the requests do not constitute a defense in the present case, and we know of no decision of any court of last resort to the contrary.

There is no error. The other Judges concurred.[19]

FENEFF v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, 1909. 203 Mass. 278, 89 N. E. 436, 24 L. R. A. [N. S.] 1024, 133 Am. St. Rep. 291.)

Tort for the loss of consortium. Writ dated November 22, 1907.

The case came on to be tried before Gaskill, J. It appeared that the plaintiff was the wife of Antoine Feneff, who previously had brought an action of his own injuries and had recovered damages in accordance with an opinion of this court reported in 196 Mass. 575. By a stipulation of the parties it was agreed that the evidence introduced by the plaintiff was the same as that in the case of her husband. There was evidence in support of all the material allegations in the plaintiff's declaration.

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[19] Semble accord: Dodge v. Rush, 28 App. D. C. 149 (1906).

At the close of the plaintiff's evidence, the judge ruled that the plaintiff could not maintain her action, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

The case was submitted on briefs.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid and assistance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. Kelley v. N. Y., N. H. & H. R. R., 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited. It is said in that case, and in Nolin v. Pearson, 191 Mass. 283, 286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority. Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, and cases cited. It is now generally held, in accordance with the decision in Nolin v.

Pearson, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in Kelley v. N. Y., N. H. & H. R. R., ubi supra. There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

While there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is Kelley v. N. Y., N. H. & H. R. R., ubi supra. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appeared to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was no error. It seems from the verdict that the defendant suffered no injustice in the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.[20]

SECTION 3.—EMANCIPATION

CITY OF PERU v. FRENCH.

(Supreme Court of Illinois, 1870. 55 Ill. 317.)

Mr. Justice SCOTT delivered the opinion of the Court:

This was an action on the case, brought by the appellee against the city of Peru, in the La Salle circuit court, to recover damages for alleged injuries sustained by the appellee in consequence of the omission on the part of the city to keep a certain street crossing in repair.

It is averred in the declaration, that the city negligently and carelessly permitted a certain street crossing, made of plank, on Bluff street, at its intersection with Rock street, to be and continue in a defective and dangerous condition; that the plaintiff, on the first day of April, 1867, without any negligence or want of due care on her part, while passing along, stepped through a hole in said crossing, and thereby her leg was broken and her ankle greatly injured; that she has since been a cripple, and will continue to be through life; that she has suffered great pain in consequence of the injuries received, and that she has spent large sums of money in endeavoring to get cured.

A trial was had on a plea of not guilty, which resulted in a verdict in favor of the appellee, for $2,000. The court overruled the motion entered for a new trial, and rendered judgment on the verdict, to reverse which the city now prosecutes this appeal.

[The opinion here denies the sufficiency of several grounds urged for a reversal, and continues as follows:]

It is in proof that the appellee was a married woman at the time she sustained the injuries complained of, but that she was divorced from her husband before this suit was instituted. It is now insisted that the appellee cannot recover in this action for the loss of her time or for money expended for medical aid during the period of her coverture. The proof shows that at the time of the accident to the appellee, her husband had abandoned her, and that she was supporting herself by her own industry. We have not been very careful to look into the books to see if a precedent could be found that would enable the appellee to recover for the loss of her labor and for money expended for medical aid, if under the same state of facts she would be entitled to recover, if a feme sole. For our law would be very defective in the remedies it provides, if it did not afford redress against a wrong doer, under such circumstances.

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[20] Accord: Goldman v. Cohen, 30 Misc. Rep. 336, 63 N. Y. Supp. 459 (1900). Contra: Clark v. Hill, 69 Mo. App. 541 (1897).

At the common law, the husband is entitled to the earnings of his wife, and he alone could sue for the loss of her labor during coverture, and for medical aid furnished to her in case of a wrongful injury. The reason for the rule was, that the husband was bound to support her in sickness, as well as in health, and therefore he was entitled to her earnings. If however the husband abandons her, and fails to furnish to her necessary support, then the reason for the rule ought also to fail.

In the case of Love et al. v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306, it was held that where a husband compels his wife to live separate and apart from him, without fault on her part, and fails to make provision for her suitable support she may acquire property and control it, and sue and be sued, as a feme sole, during the continuance of such condition. The same rule was approved in the case of Prescott v. Fisher, 22 Ill. 390, and in Burger et ux. v. Belsley et al., 45 Ill. 72. In the latter case the court say "that the law has wisely afforded a remedy for every wrong, and is not restrained by its inflexible rules from adopting all such means as will protect the citizen in his personal security."

The evidence in this case shows that the appellee, herself, obtained a divorce from her husband, and it is not, therefore, unreasonable to presume that she was living separate and apart from him, without fault on her part. It would shock our sense of justice to hold that a married woman, when thus abandoned by her husband, without fault on her part, could not recover from the guilty party in an action for personal injuries wrongfully inflicted, for the loss of her time, and also for medical aid furnished to her, which, in many instances, might be absolutely necessary to the preservation of life itself.

We perceive no substantial error in the record. Let the judgment be affirmed.

Judgment affirmed.

CHAPTER III

THE HUSBAND'S INTEREST IN AND POWER OVER HIS WIFE'S CLAIMS ON ACCOUNT OF TORTIOUS DAMAGE TO HER

BALLARD v. RUSSELL.

(Supreme Judicial Court of Maine, 1851. 33 Me. 196, 54 Am. Dec. 620.)

On Report, from Nisi Prius; Wells, J., Presiding.

Case for an injury to the female plaintiff, by mal-practice of the defendant, in attempting to reduce a fracture of the fore-arm and dislocation of the wrist. The husband prior to the injury had deserted the wife, and for eight years had made no provision for her support. He resided in the same town, and in co-habitation with another woman.

The defendant introduced an unsealed discharge, signed by the husband, and given prior to the suit, stating that he had received of the defendant, fifty dollars, in full for the injury. The counsel for the female plaintiff, then offered a document, (of one day's date later than the discharge,) by which the husband assigned to the wife the cause of action, and empowered her to collect the same for her use, and to make all needful use of his name. The case was taken from the jury and submitted to the Court. If the Court should conclude that the discharge given by the husband to the defendant would defeat the action, the counsel moved to amend, by striking the husband's name from the writ, and that thereupon the action should stand for trial.

WELLS, J. (orally). It is suggested that the discharge by the husband to the defendant was obtained through fraud. The Court cannot yield to that suggestion. If the plaintiffs would have availed themselves of it, the question should have been submitted to the jury.

By the common law, both husband and wife must join to maintain an action like the present. This case does not come within any exception to the principles stated. The husband has not abjured the realm; and the facts stated in the report of the case, do not deprive him of the power to control the action nor to discharge the cause of it.

The statutes giving additional rights and remedies to married women, relate to property, and do not apply to this case. Hence the proposed amendment, by striking out the name of the husband, would be of no advantage to the wife.

It appears that the husband, the day after he had discharged the cause of action, gave his wife a written power of attorney to prosecute the claim for her own benefit. But the cause of action having been previously discharged, could not be revived by such an instrument.

It results that the action cannot be maintained, and the plaintiffs must be called.

LAUGHLIN v. EATON.

(Supreme Judicial Court of Maine, 1866. 54 Me. 156.)

Barrows, J. To this action for malicious prosecution upon a charge of adultery, the defendants seasonably pleaded in abatement the coverture of the plaintiff. Plaintiff replied denying the coverture and tendering as issue to the country, which was joined by defendants, and the case was submitted to the presiding Judge to be decided without the aid of a jury upon an agreed statement of facts, the more important of which are as follows: The plaintiff's maiden name was Lovina Wight. She was a native of Vienna, in this county where her parents still reside. After an absence at service for two or three years she returned to Vienna in 1851 or 1852 with John Laughlin, whom she introduced as her husband, and who called her his wife. She said they were married, and thereafterwards they lived and cohabited together as husband and wife, having several children, one of whom is now living and with her. Since the reputed marriage she has assumed the name of Laughlin, and she and her children are known by that name. Six or seven years ago Laughlin went to California, where he was seen a few months since by a man who knew him here. Since he went thither he and the plaintiff "have kept up a correspondence as husband and wife, he sending her funds quite often."

[After finding that the marriage of the plaintiff had been proved, the court proceeds to consider the exception to the ruling below sustaining the plea and ordering the right to be abated, as follows:]

The well known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation, or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife, or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure, or if she be maliciously indicted and thereby separated from him, or he put to expense in her defence. But, if the action is brought for her personal suffering and injury, the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover. 1 Chitty's Pl., 46, 47, 61; Horton & Ux. v. Byles, 1 Siderfin, 387; Russell & ux. v. Corne, 1 Salkeld, 119; Hyde v. Scyssor, Cro. Jac. 538.

When an injury is done to both, as slander or battery of husband

and wife, separate actions must be brought, one by the husband alone for the injury to him, and one by the husband and wife for the injury to her. If both causes of action are joined it is error. Ebersoll v. Krug & ux., in error, 3 Bin. (Pa.) 555. There is nothing in this case which brings it within any known exception to the general rule above stated. John Laughlin has not been banished or abjured the country, or deserted his wife and gone beyond seas. So far as appears, he is still in frequent communication with her, supplying her with funds and only temporarily, though long absent.

In Gregory v. Paul, 15 Mass. 31, cited for plaintiff, the wife a foreigner, deserted by her husband in a foreign country, who had hereafter maintained herself as a single woman, and lived for five years in Massachusetts, her husband never having been within the United States, was holden competent to sue as a feme sole. Section 10, c. 61, Rev. St. 1857, embodies the doctrine thus laid down, with some additions, as the law of this State. It is unnecessary to contrast the case of Gregory v. Paul with the one at bar, or to consider further under what circumstances the absence of the husband from the State will excuse his nonjoinder in a suit of this description.

Nor do our other statutes authorizing married women in certain cases to maintain suits as if sole, enlarge the plaintiff's rights in a suit like this. Under section 3, c. 61, a married woman, may, if she pleases, prosecute suits at law or in equity for the preservation and protection of her property as if unmarried, and may maintain an action in her own name to recover the wages of her personal labor, not performed for her own family.

But it was determined by this Court, in Ballard & ux. v. Russell, 33 Me. 196, 54 Am. Dec. 620, that the statute enabling her to sue for the preservation and protection of her property did not extend to rights of action for tort to the person.

The plaintiff's counsel urges that, if enabled to sue in her own name, without joining her husband, for the protection of her property, much more ought she to have that power for the protection of her liberty and reputation, when her husband is out of the jurisdiction, or his consent cannot be had to join in the suit.

The argument would be appropriately addressed to the Legislature.

The present state of the law requires that the entry in this case should be

Exceptions overruled.

APPLETON, C. J., and KENT, WALTON, DICKERSON and DANFORTH, JJ., concurred.[1]

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[1] In Gustin v. Carpenter, 51 Vt. 585 (1879), it was held that a married woman, whose husband was insane and confined in an asylum for insane persons in a state other than that of the woman's residence, may sue in her own name for a wrong personal to herself. In Burger v. Belsley, 45 Ill. 72, at page 75 (1867), the court, by Mr. Justice Walker, said: "But having joined with the wife, and brought the suit, or having consented that it might be done, we are at a loss to perceive any reason why he should be permitted to

CITY OF CHICAGO v. SPEER.

(Supreme Court of Illinois, 1872. 66 Ill. 154.)

Mr. Justice McALLISTER delivered the opinion of the Court:

This was case, by appellees, as husband and wife, against the city of Chicago, to recover damages for a personal injury to the wife. There was a trial upon the plea of not guilty, and verdict in favor of appellees, upon which the court, overruling a motion for new trial, gave judgment. The case was brought here by appeal, and the only error assigned, which we shall consider, is, that of overruling the motion for new trial, and rendering judgment in favor of appellees and against appellant. The bill of exceptions purports to contain all the evidence, from which it appears that there was evidence tending to show a cause of action in favor of one of the appellees, viz.: the wife; but unless the husband has the same rights in respect to damages for personal injury to the wife, since the act of 1861 concerning the separate property of married women, which he had at common law, then there is no cause of action shown in favor of both plaintiffs in the action, and the case presents the ordinary one of a joinder of too many plaintiffs in the action, which, even in actions ex delicto, is a ground of non suit on the trial. Murphy v. Orr, 32 Ill. 489.

The common law rule in actions for personal injury to the wife is stated thus: "When an injury is committed to the person of the wife during coverture, by battery, slander, etc., the wife can not sue alone in any case, and the husband and wife must join if the action be brought for the personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not to that of the wife alone; for the damages will survive to the wife, if the husband die before they are recovered." 1 Chit. Pl. 72, 73.

This rule was founded upon the common law of husband and wife, and admirably adapted to the preservation of it entire. By that law, damages for an injury to the person or reputation of the wife belonged to her,—they were her property,[2] but subject to the right of the hus-

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retract. While he may refuse to proceed further and increase his liability for future costs, he surely has no right to have indemnity against those he has voluntarily incurred, or permitted to be made, with his consent. His liability in such a case has been incurred, and he has no claim moral or legal to have them refunded, or to be indemnified against their payment from his wife. Nor does the law give him the right to impose the terms or conditions in a case like the present, upon which his wife may seek redress, through the channels of the law, for injuries she may have suffered in her person or property. Nor can the court in the exercise of a discretion impose such terms. The court therefore erred in requiring an indemnity against liability for costs already accrued."

[2] In C., B. & Q. R. R. Co. v. Dunn, 52 Ill. 260, at 264, 4 Am. Rep. 606 (1869), the court, by Mr. Chief Justice Breese, said:

"If, then, it can be established that the right of action for this injury to the wife is property, as it came to her from a source other than her husband, when collected, to reduce them to possession; the exercise of which right wholly divested the wife, and made them the absolute property of the husband. But inasmuch as they belonged to the wife, subject to the marital right of the husband just mentioned, if the husband died before they were collected and reduced to possession by him, then the cause of action, if not in judgment, would survive to her; or if in judgment in their joint names, the judgment itself would belong to her, so that, under this peculiar mixture of rights, it was necessary for both to join, because, if he should sue alone, recover judgment, and die before it was collected, the judgment would go to his executor, and the wife be deprived of her rights.[3]

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band, and in good faith, then it was her separate property, and comes under the operation of the act of 1861. The statute is very comprehensive—all property.

"Chancellor Kent, in his Commentaries, says another leading distinction, in respect to goods and chattels, is the distribution of them into things in possession and things in action. The latter are personal rights, not reduced to possession, but recoverable by suit at law. Money due on bond or other contract, damages due for breach of covenant, for the detention of chattels or for torts, are included under this general head or title of things in action. Comstock's Ed. 2 Kent's Com. 432, under the head, 'Of the Nature and Various Kinds of Personal Property.'

"A right to sue for an injury is a right of action—it is a thing in action, and is property, according to this authority. Who is the natural owner of this right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain. Indirectly, it is true, the husband was an injured party, also, during her disabilities, in deprivation of his comfort by reason thereof, and by the further reason of his responsibilities for the charges for her care. For these he can undoubtedly sue and recover such damages as he may prove.

"Why is not this right of action property? Law commentators of distinguished ability say it is, and with good reason, speaking according to well recognized principles. It is true, it is a right which cannot be transferred to another, and dies with the person entitled to it; but it is none the less property in that person, while living, which can be claimed, so long as the bar of the statute of limitations cannot be interposed.

"Would the purposes and object of the act of 1861 be carried out, indeed, could they be, should this court hold, in view of the decision in Emerson v. Clayton, 32 Ill. 493, that the wife could not sue alone for an injury to her person? Suppose she is slandered, and the husband chooses to pass the slander by, though he knows his wife is withering and agonizing under its influence? Suppose she is assaulted and beaten, and the husband, for causes satisfactory to himself, but having no foundation in reason or justice, refuses to prosecute the wrong doer? Can it be denied the wife has, in both these cases, a property in the right of action the law gives, that it is her separate property, and that she acquired it during coverture? It is conceded, she may sue for an injury to her horse, being her separate property, or bring her action of trespass for despoiling her of an earring, or any other personal ornament of value, but for grievous injuries to her person she must await the consent of her lord and master. This is not, in our judgment, in accordance with the spirit of the act of 1861.

"We are satisfied this right of action is property, included in the words, 'all property;' it was the separate property of the wife, acquired during coverture, and from a source other than her husband, and she alone can control it."

[3] If the wife died first, and the action was not one which survived the death of the one entitled, the action, being in reality the wife's, did not sur-

Such being the interest of the wife in damages for a personal injury to her, and the husband's paramount right of control at common law, the question is as to the effect of the legislation of 1861 upon such rights. It is the settled law of this court that it has been to divest them of their mixed nature at common law by wholly extinguishing that of the husband, stripping him of all authority to reduce such damages to possession, or even interfere with them without the consent of the wife, and clothing her with all the absolute rights, power and control in and over such right of action as a feme sole would have.

The effect of the act alluded to is, to take away the reason of the rule requiring a joinder, and, by implication, destroy its force and application, and why does not the rule itself cease? "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." Broom's Leg. Max. 161.

With what propriety can the husband be joined in such action, and the declaration conclude to their damage, when he has no legal interest whatever in the subject matter of the suit? If he may be joined as plaintiff and judgment recovered in their joint names, he may, in ordinary cases, receive the damages when collected, and if he may receive them, then they are exposed to the jeopardy of appropriation to his own use, and all this contrary to the manifest spirit of the statute, which was designed to subvert the common law rule of husband and wife, with all its incidents. It is a general rule that the laws and customs of the State cannot be changed without an act of the legislature. This was the doctrine of the common law of England (12 Rep. 29), and is applicable here. But we must regard the act which changes the rights of husband and wife in the very particular which afforded the reason of the rule requiring the husband to join in the action, by extinguishing his rights altogether, as dispensing with the rule itself, by necessary implication; because the joinder and its effects would be directly repugnant to, and inconsistent with, the purposes of the act.

For the misjoinder of plaintiffs, the judgment of the court below is reversed and cause remanded.

Judgment reversed.

SAMARZEVOSKY v. BALTIMORE CITY PASS. RY. CO.

(Court of Appeals of Maryland, 1898. 88 Md. 479, 42 Atl. 206.)

Briscoe, J.[4] This suit was brought on the 19th of November, 1897, by Appolonia Samarzevosky, a married woman, by her husband and next friend, Felix Samarzevosky, against the Baltimore City Passenger Railway Company, to recover for alleged personal injuries sustained by her. The declaration was demurred to upon the ground that

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vive, and hence the husband could not have judgment alone. Stroop v. Swarts, 12 Serg. & R. (Pa.) 76 (1824).

[4] Part of the opinion is omitted.

a suit for personal injuries to a married woman must be brought by the wife and husband jointly, and this involves a construction of Acts 1892, c. 267, relating to married women. * * *

But it is contended that Acts 1892, c. 267, changed the rule of law as heretofore established, and gave her the right to sue, independently of her husband, for injuries to her person as well as to her property. Now it appears, by the act of 1892, that section 1 of article 45 of the Code was repealed and re-enacted, so as to read: "The property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire or receive after her marriage, by purchase, gift, grant, devise, bequest, descent, in a course of distribution, or in any other manner, shall be protected from the debts of the husband." And it is earnestly insisted that the effect of the insertion of the words, "or in any other manner," by this amendment, makes the right of action for personal injuries to a married woman her separate property, for which she can sue by her next friend.

We cannot give this act the construction here contended for. The act does not specify or declare what is property and what is not, but refers to the different modes of acquisition of property by the wife. It enumerates several methods, such as by purchase, gift, grant, etc., and then says, "or in any other manner." It simply enacts that the wife shall have her property, in whatever manner it may be acquired, and thereby it enlarged the mode of acquisition of property by her. Whatever, then, may be the decision elsewhere, this court has never held that a mere right of action in tort was property that could be sold or transferred before a recovery by judgment. On the contrary, in the case of Booze v. Humbird, 27 Md. 1, it is distinctly stated that a claim for costs and damages is inchoate, and contingent upon events which in this case have not occurred. As much so as any unliquidated claim for a personal injury, which depends upon the rendition of a judgment before such claim can be assets in the hands of personal representatives, the damages claimed in such action could not have been considered personal assets before judgment recovered, and no claim to damages can arise until they are consummated by final judgment. And it is quite manifest that in Wolf v. Bauereis [72 Md. 488, 19 Atl. 1045, 8 L. R. A. 680] and in Railway Co. v. Kemp [61 Md. 77], supra, where it was held that husband and wife must join in an action for personal injuries, the court considered that a claim for damages was not property. It follows, then, from what has been said, that the judgment below on demurrer was correct, and it will be affirmed.

Judgment affirmed, with costs.[5]

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[5] Accord: Snashall v. Metropolitan R. R. Co., 19 D. C. 407 (1890); Howard v. Chesapeake & O. Ry. Co., 11 App. D. C. 300 (1897). Under a married woman's act providing that a married woman shall receive the same protection as to her rights as a woman which her husband does as a man, a married woman living with her husband may recover damages in her own name and right for an assault upon her by a third person. Long v. McWilliams, 11 Okl. 562, 69 Pac. 882 (1902).

CHAPTER IV

LIABILITY OF HUSBAND FOR THE ANTE-NUPTIAL TORTS AND CONTRACTS AND THE POST-NUPTIAL TORTS OF THE WIFE

A HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS, AND THE MARRIED WOMEN'S PROPERTY ACT, by T. Cyprian Williams, Law Quarterly Review, vol. 16, pp. 191, 192: "At common law, a wife was not under any incapacity in respect of wrong like her incapacity in respect of contract. She had the obvious human capacity of doing harm to others; and she was perfectly competent at law to incur an obligation ex delicto. And if she incurred such an obligation, it attached properly upon herself, and not upon her husband. For a tort committed by a wife was, and is, no cause of action against her husband; but it was, and is, a good cause of action against herself. See Keyworth v. Hill, 3 B. & A. 685; Vine v. Saunders, 4 Bing. N. C. 96; Catterall v. Kenyon, 3 Q. B. 310; Capel v. Powell, 17 C. B. N. S. 743. In consequence, however, of the general common-law rule, that a married woman could not sue or be sued by herself alone, it was necessary, on suing a wife for her tort, to join her husband as co-defendant. Bac. Abr. tit. Baron and Feme (L); Head v. Briscoe, 5 C. & P. 484; 38 R. R. 841; 2 L. J. (N. S.) C. P. 101. If the action were successful, judgment was given against the husband and wife jointly. The wife was personally liable upon such a judgment just as much as the husband; and before the abolition of imprisonment for debt, she might have been taken in execution and imprisoned to satisfy such a judgment, whether her husband were also taken in execution or not. Finch v. Duddin, 2 Stra. 1237; Ferguson v. Clayworth, 6 Q. B. 269; Newton v. Boodle, 9 Q. B. 948; Newton v. Boodle, 4 C. B. 359; Larkin v. Marshall, 3 Ex. 804. The court would exercise its discretion in discharging the wife, if she had no separate property, but otherwise not. Edwards v. Martyn, 17 Q. B. 693; Ivens v. Butler, 7 E. & B. 159; Ex parte Butler, Jay v. Amphlett, 1 H. & C. 637. And the wife's liability for her torts continued after her husband's death or the dissolution of the marriage, when she might be sued alone in respect of them. But the husband's liability for his wife's torts was a mere consequence of his liability to be sued jointly with her. If the wife died or the marriage were dissolved, the husband could no longer be sued for his wife's tort, and any action commenced during the marriage upon such a cause of action at once abated. So that a husband sued jointly with his wife for her tort escaped all liability if his wife died before judgment. See Hardres, 161; Baron v. Berkley, 1 Lut. 670; Capel v. Powell, 17 C. B. N. S. 743."[1]

BAUM v. MULLEN.

(Court of Appeals of New York, 1872. 47 N. Y. 577.)

Church, C. J. The only question presented for our decision is whether the joinder of the husband with the wife is necessary in an action for fraud in a contract for the sale of the real estate of the latter made by the former as the agent of his wife. We are of opinion that such joinder is not necessary. The statutes of 1860 and 1862 provide that "the wife may sue and be sued in all matters having relation to the sole and separate property, the same as if she were sole," and judgment may be enforced against her separate property as if she were sole. Laws 1862, p. 344.

The counsel for the appellant claims that at common law the husband is liable for the torts of the wife, and that this act has never been changed. This position is correct. The statute has not altered the common-law liability of the husband for the mere personal torts of the wife, but when such torts are committed in the management and control of her separate property, the rule is changed, and she is liable the same as if she was unmarried, and can be sued in the same manner.

In this case it is found that by the fraudulent representations of the husband, acting as the agent of the wife in contracting for the sale of her property, $200 was received, which it is presumed was paid to her. She is responsible for the fraud, and has had the avails of it. The action is clearly for "matters having relation to her sole and separate property."

They relate to the management and disposition of her property. The circumstance that the fraud was committed by her husband, acting as her agent, does not impair her liability. She had a right to employ her husband as agent, and, while acting as such in relation to her separate property, her liability for his acts is precisely the same as it would be for the liability of any other agent. The statute has in a great degree abrogated the respective common-law rights, obligations and duties of husband and wife growing out of the marriage relation, as it respects property which the wife is permitted to own. As to such property, she is to be treated as unmarried. All the rights of an unmarried woman are conferred upon her, and all correlative obligations are imposed.

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[1] The same rules apply even more clearly where the husband's liability for the ante-nuptial tort of the wife is involved. In an action for the ante-nuptial tort of the wife alone to one other than the husband, the husband must be joined, and judgment may be had against him as well as the wife. Hawk v. Harman, 5 Bin. (Pa.) 43 (1812); Prescott v. Fisher, 22 Ill. 390 (1859). The same is true regarding the ante-nuptial contracts of the wife alone with one other than her husband. The husband, however, cannot be sued alone. Mitchinson v. Hewson, 7 Term R. 348 (1797); Gray v. Thacker, 4 Ala. 136 (1842). He is only liable during coverture. No suit can be brought against him after coverture has terminated. Heard v. Stamford, 3 P. Wms. 409 (1735). And if coverture ends after suit is brought, but before judgment, no judgment can be had against him. Lamb v. Belden, 16 Ark. 539 (1855). Upon the husband's death the wife becomes solely liable. Woodman v. Chapman, 1 Campb. 189 (1808); Parker v. Cowan, 1 Heisk. (Tenn.) 518 (1870).

The statute has declared equality of rights, and equality of obligations and duties, and courts have no alternative but to enforce both. The wife is liable in the same manner and to the same extent for frauds or torts committed in the management of her property, as she is upon contracts relating to it, and just as liable for fraudulent representations upon the sale of it as upon a covenant for quiet enjoyment.

In Rowe v. Smith, 45 N. Y. 230, this court held that the wife was liable for trespass committed by her hogs and cattle escaping from her lands upon the premises of another, and the same principle is applicable to this case. But the principle here decided does not affect the common-law liability of the husband for the mere personal torts of the wife disconnected from the management of her separate property.

The judgment must be affirmed with costs. All concur.

FOLGER, J., absent.

Judgment affirmed.[2]

CONNOR v. BERRY.

(Supreme Court of Illinois, 1868. 46 Ill. 370, 95 Am. Dec. 417.)

LAWRENCE, J. The only question presented by this record is, whether the husband is liable for the debts of the wife contracted before coverture, the marriage having taken place since the passage of the law of 1861, for the protection of married women in their separate property. It is contended for the appellants, with a good deal of plausibility, that, as that act secures to a married woman the separate control and enjoyment of her property, the reason of the common law rule imposing liability upon the husband, and with the reason, the rule itself must be considered as having ceased. But we are not prepared to say the reason has so far ceased as to justify us in overturning, by judicial construction, a rule so firmly established in our law. All that can be truly said is, that the act of 1861 has, in part, abolished the grounds upon which the courts and text writers have placed the liability of the husband, but it has not wholly done so. That liability rests not merely upon the fact that, by the common law, the husband becomes, upon marriage, the owner of his wife's personal property, when reduced to possession, and of a life estate in her realty, but also upon the ground that he is entitled to the entire proceeds of her time, industry and skill. As a means of paying her debts, it can hardly be said that her earnings are of less consequence than her accumulated property. In most cases in this country they would be of far greater. Yet this court has held, in Bear v. Hays, 36 Ill. 280, and in several subsequent cases, that, notwithstanding the act of 1861, the husband is still entitled to the wife's earnings. So it has held in Cole v. Van Riper (April term, 1867) 44 Ill. 58, that he still has a qualified tenancy, by the curtesy, in her lands. With these legal incidents of marriage still existing, we cannot say the legislature intended, by the act of 1861, to relieve the husband from the obligation to pay his wife's debts imposed upon him by the existing law.

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[2] Accord: D. Wolff & Co. v. Lozier, 68 N. J. Law, 103, 52 Atl. 303 (1902); Russell v. Phelps, 73 Vt. 390, 50 Atl. 1101 (1901). Semble, contra: Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374 (1892).

Judgment affirmed.[3]

HOWARTH v. WARMSER.

(Supreme Court of Illinois, 1871. 58 Ill. 48.)

Action against husband and wife for the ante-nuptial contract of the wife. Judgment for the plaintiff against both. Appeal.[4]

Mr. Chief Justice LAWRENCE delivered the opinion of the Court:

We held, in Connor v. Berry, 46 Ill. 370, 95 Am. Rep. 417, and McMurtry v. Webster, 48 Ill. 123, that the husband was still, as at common law, liable for the debts of his wife, contracted before marriage, notwithstanding the act of 1861, because that act still left to the husband the wife's earnings. Since those decisions were made, the legislature, by the act of 1869, has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has virtually abolished it, by taking away its foundations and rendering its enforcement unjust.

The judgment must be reversed and the cause remanded.

Judgment reversed.

NORRIS v. CORKILL.

(Supreme Court of Kansas, 1884. 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489.)

Action for slander against husband and wife. Demurrer to the petition sustained, and cause dismissed as to the husband. Plaintiff excepted, and brings the cause here.[5]

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[3] Accord: Berley v. Rampacher, 5 Duer (N. Y.) 183 (1856), husband liable for post-nuptial tort of wife; McQueen v. Fulgham, 27 Tex. 463 (1864); Kellar v. James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1093 (1907); Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160 (1902); Ferguson v. Brooks, 67 Me. 251 (1877). Contra: Kies v. Young, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198 (1897); Lane v. Bryant, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709 (1896). See, also, Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354 (1888).

[4] Statement abridged.

[5] Statement abridged.

HORTON, C. J. The question presented in this case is, whether the husband is liable for the slanderous words spoken by his wife when he is not present and in which he in no manner participates. The rule of common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is, that the husband is entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife, by her marriage, is entirely deprived of the use and disposal of her property and can acquire none by her industry; that her person, labor and earnings belong unqualifiedly to the husband. Reeve's Domestic Relations, 3; Tyler, Infancy and Coverture, § 233.

Again, the husband by common law might give the wife moderate correction, for, as he was to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. 1 Bl. Comm. (Wendell's Ed.) 444, 445.

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him, and her legal existence was merged in that of her husband so that they were termed and regarded as one person in law. Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Tyler, Infancy and Coverture, ch. 19, §§ 216–223.

Under the statute of Kansas—

"The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." Comp. Laws 1879, c. 62, § 1.

"A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent and with like effect, as a married man may in relation to his real and personal property." Section 2, c. 62, supra.

"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." Section 4, c. 62, supra.

In addition, section 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were unmarried. Therefore it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property; nor is she prohibited from acquiring property by her own industry. It is not true under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion over her personal property, her labor, or her earnings. If she so desires, they are unqualifiedly her own, and he cannot interfere with them.

Again, in this state, the common-law power of correction of the wife by the husband is no longer tolerated. Under the common law, the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself." Martin v. Robson, supra. Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this state the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts.

We have examined the various authorities conflicting with these views, but owing to the provisions of our statute we are not inclined to follow them, and therefore think it unnecessary to refer to them.

The judgment of the district court will be affirmed.[6] All the Justices concurring.

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[6] Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578 (1872); Goken v. Dallugge. 72 Neb. 16. 99 N. W. 818. 101 N. W. 244, 103 N. W. 287 (1904).

In Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009 (1908). the same result was reached under a statute which repealed an act providing that. in an action in tort against a husband and wife for the tort of the wife. execution should first be levied on the lands of the wife, and provided that the wife might sue and be sued in all matters as if she were sole.

CHAPTER V

DUTY OF THE HUSBAND TO SUPPORT THE WIFE—THE AUTHORITY OF THE WIFE TO MAKE CONTRACTS FOR THE HUSBAND AS HIS AGENT[1]

LANE v. IRONMONGER.

(Court of Exchequer, 1844. 13 Mees. & W. 368.)

Debt for goods sold and delivered.

Plea, except as to £15., never indebted; and as to that sum, payment of money into Court.

At the trial, before Pollock, C. B., at the Middlesex Sittings after last Trinity Term, it appeared that the action was brought to recover the sum of £5287. for various articles of millinery, viz. bonnets, feathers, lace, and ribands, supplied by the plaintiff to the defendant's wife, during part of the year 1843. It further appeared that the defendant's wife had a separate fortune, though she and her husband were living together; and that the plaintiff, having been induced to make inquiry, was told he had £1100. per annum. There was no evidence of any express authority given by the husband to his wife to order the articles in question. Under these circumstances, it was contended for the defendant, that, as the articles ordered by the defendant's wife were excessive in amount, and there was no evidence of any express authority given by him, the jury ought not to infer that the wife had any implied authority from her husband to order the goods; and the direction of Lord Abinger, C. B., to the jury, in the case of Freestone v. Butcher, 9 Car. & P. 647; was relied upon. The learned Judge having read that direction to the jury, told them that he approved of and adopted it; and the jury thereupon found a verdict for the defendant.

Humfrey now moved for a new trial, on the ground of misdirection.—The direction of the learned Judge in this case proceeded upon the doctrine laid down by Lord Abinger, C. B., in Freestone v. Butcher, which it is submitted, is not correct in law, and cannot be supported. His lordship there says, "The general rule is, that a wife cannot bind her husband by her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appears to the contrary, the jury do right in inferring the agency; but if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which a jury would infer that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one of an extravagant nature, such as the husband would never have authorized, that would be alone sufficient to repel the inference of agency." So unqualified a doctrine cannot be maintained. [PARKE, B.—It is because she is the agent of her husband that the tradesman ought to be careful not to supply her to an extravagant extent, for her giving orders to such an extent would go to show she was not acting as the husband's agent, and to the extent authorized by him.] The case of Freestone v. Butcher seems to carry the law as to the husband's exemption from liability further than any of the cases which have preceded it. This is a case in which the husband and wife are living together, and it may fairly be presumed that he had seen these articles of dress worn by his wife. In Montague v. Benedict, 3 B. & Cr. 635; it is said that "cohabitation is presumptive evidence of the assent of the husband; but it may be rebutted by contrary evidence." In that case there was evidence to rebut the presumption, and the contract was held not to be within her authority. [POLLOCK, C. B.—How can you distinguish between clothes and rings, which are both ornamental? Jewellery may be just as fit to be ordered by a lady as lace or any other article of dress. PARKE, B.—The only question is, whether the extravagance of the bill is an element to be taken into consideration by the jury, in considering the question of the wife's agency. Surely it is.] It was incorrect in the learned Judge to say, in the words of Lord Abinger's ruling that the extravagance of the bill "would be alone sufficient to repel the inference of agency."

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[1] Observe that a married woman may, like an infant (ante, p. 115) be not only an agent, but also a trustee, provided, of course, the legal title can become vested in her, and if it does so subject to the married woman's incapacity to deal with it. Still v. Ruby, 35 Pa. 374 (1860).

PARKE, B. There may be a trifling inaccuracy in the report in the case of Freestone v. Butcher, in stating that the extravagance of the bill would alone repel the inference of agency; that alone, perhaps, would not be sufficient; but it may be repelled by that and other circumstances together. The law as there laid down is substantially correct. The whole turns upon the question of the husband's authority; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject, he might have made inquiries of the husband. It was not proved that the husband knew the articles had been ordered, or saw his wife wearing them.

POLLOCK, C. B., and GURNEY, B., concurred.

Rule refused.[2]

DEBENHAM v. MELLON.

(House of Lords, 1880. L. R. 6 App. Cas. 24.)

Appeal against a decision of the Court of Appeal which had affirmed a judgment of the Queen's Bench Division upon a ruling of Mr. Justice Bowen.

The Appellants brought an action against the Defendant for the price of goods supplied to his wife. The statement of claim described the goods as sold and delivered to the Defendant, ordered for him by his wife as his duly authorized agent in that behalf.

The defence denied that the goods were ordered by the Defendant's wife as his agent, alleged that his wife was not his agent in that behalf, and had no authority express or implied to pledge his credit for the goods, as the Plaintiffs knew or ought to have known. Issue thereon.

The cause was tried in London before Mr. Justice Bowen and a jury. The Plaintiffs were drapers in London—the goods were admitted to be necessaries suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the Defendant, that, by an arrangement between the husband and wife he was to furnish her with £52. a year (on some occasions increased to £62.) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in Devonshire and then at Bradford. They lived together in the ordinary way. The question left by the Judge to the jury was whether at the time when the goods were ordered, the Defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the Defendant. The Queen's Bench Division refused a new trial.

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[2] In Jones v. Gutman, 88 Md. 355, 41 Atl. 792 (1898), an instruction that if the goods were sold and delivered to the wife upon the husband's credit, and were proper and suitable for one in her station, the husband is liable, was held erroneous. See, also, Johnson v. Briscoe, 104 Mo. App. 493, 79 S. W. 498 (1904). In Gotts v. Clark, 78 Ill. 229 (1875), the court, by Mr. Chief Justice Scott, said: "This action was brought by plaintiff, to recover of defendant the value of goods sold and delivered to defendant's wife and minor daughter. So far as the goods sold to defendant's wife are concerned, we see no reason why he should not pay for them. The evidence shows he is a man of considerable wealth; that the goods purchased were necessary and suitable to his wife's position in life, and under the circumstances proven the jury were justified in their finding, that she was his agent to make the purchases."

The Plaintiffs appealed, and the case was heard before Lords Justices Bramwell, Baggallay, and Thesiger, who, following and adopting the decision in Jolly v. Rees, 15 C. B. (N. S.) 628, 33 L. J. (C. P.) 177, affirmed the ruling in the court below, 5 Q. B. D. 394. This appeal was then brought.

The Lord Chancellor [Lord Selborne]. My Lords, you are asked in this case to review the decision of the Court of Common Pleas in 1864, in Jolly v. Rees, 15 C. B. (N. S.) 628, 33 L. J. (C. P.) 177, the correctness of which, as far as I know, has not been seriously controverted since that time.

The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.

That principle is now controverted; and the first question before your Lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a feme sole? On that point, I think it enough to say, that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise, when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her, —but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no primâ facie evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing.

I therefore lay aside that proposition; and, thinking it clear, that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question; whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not (like marriage), a status, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities, which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some primâ facie evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do. Mr. Benjamin says, that those words are not the best which might be used for the purpose; but that "apparent authority," or "ostensible authority," would be better. I am not at all sure that Mr. Benjamin's words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word "apparent," or the word "ostensible," becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption primâ facie, and not absolute; not a presumption of law, but one capable of being rebutted. When Chief Baron Pollock, in Johnston v. Sumner, 3 H. & N., at page 268, said, that all the usual authorities of a wife under those circumstances might be assumed, "notwithstanding any private arrangement," I suppose him to have had in view that state of facts, under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife. The same learned Judge in another case which was cited during the argument, viz., Reneaux v. Teakle, 8 Ex., at page 682, said, that the case of the wife, in principle at all events, was not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact.

Now, my Lords, in the present case, that ordinary state of circumstances which usually accompanies cohabitation where there is a house and an establishment, is entirely wanting. There was here no house, no establishment; none of those things was done, in the way of living upon credit, to provide for the ordinary and daily wants of a family or an establishment, which commonly raise the presumption. The husband and wife were both servants of a company of hotel keepers at Bradford. They lived in the hotel, which belonged to their employers; their whole board and lodging (which I take, upon the evidence, to have included that of their children) being found for them by the company; and therefore there was, in point of fact, no domestic management at all. The credit, such as it was, was given by a London tradesman to a woman living in Bradford in these circumstances. No single act is shewn to have been done by him upon the faith of any appearance of authority in the wife; he made out all the bills to the wife in her own name. This, no doubt, would not have prevented him from recovering against the husband, if the husband was otherwise liable, but it certainly does not tend to shew that he supposed he was giving credit to the husband; much less that he was misled into doing so by any conduct of the husband. That the husband never knew any of these things is perfectly clear. The necessary conclusion of fact is, that the husband did not hold out his wife as having any authority, by any act, or by any course of conduct, either to the plaintiff or to any other persons, of whose dealings the plaintiff might be presumed to have cognizance.

Then, if the Plaintiff can recover at all, it can only be because there was, notwithstanding this state of things, an actual authority in point of fact. But the evidence conclusively shews, that there was no such authority. It is said, that, when this married pair lived, four or five years before the beginning of the dealings between the wife and the Plaintiffs (much more than that time before this particular debt was contracted), at Westward-Ho in Devonshire, there were some other people who did give credit to the husband, the wife then acting as his agent. That the Plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the Plaintiff began that state of things, being disapproved of by the husband, was put an end to. The husband at that time expressly determined and revoked any authority, which he might previously have given to the wife; and he afterwards, at the time when this debt was contracted, was making her an annual allowance more than sufficient for any necessary purposes of her clothing, according to the state of their circumstances and condition in life. It is said that of that revocation the Plaintiff had no notice; but the Plaintiff had no notice of the circumstances which made the revocation necessary, he never had notice of any single fact material to the question of authority, except that she was a married woman.

It was argued that, because these articles were found to be in some sense "necessaries" in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it; much less can he be bound in a case like this where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing.

These observations dispose of the whole case; but I must add, without going into the authorities, that if the principles which run through them from first to last are regarded (as they ought to be) rather than casual dicta coloured (as they necessarily must be) by the circumstances of particular cases, the whole of those authorities are really consistent with each other, and with the decision which was arrived at by the majority of the Court of Common Pleas in the case of Jolly v. Rees, 15 C. B. (N. S.) 628, 33 L. J. (C. P.) 177.

Therefore, my Lords, I move your Lordships that this appeal be dismissed, and the judgment of the Court below affirmed.[3]

[The concurring opinions of Lord BLACKBURN and Lord WATSON are omitted.]

DOLAN v. BROOKS.

(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 350, 47 N. E. 408.)

Contract to recover the price of a dress furnished by the plaintiff to the wife of the defendant. The case was tried without a jury. There was evidence tending to support the claim. The defendant testified that he never had any business transactions with the plaintiff; that his wife had a separate income from which for about ten years she had paid for her clothing; that she had traded with plaintiff for three or four years, paying her bills with her own checks, but that he had paid for some clothing contracted for by his wife; that he paid substantially all the bills for the maintenance of his household except the clothing bills for his wife and daughters. The wife's previous purchases from the plaintiff had been paid for the wife with her own checks.

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[3] Accord: Morel Bros. v. Earl of Westmoreland, [1903] 1 K. B. 64; Slater v. Parker, 24 T. L. R. 621 (1908); Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621 (1903); Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362 (1891); Compton v. Bates, 10 Ill. App. 78 (1882).

A fortiori if there is an express prohibition upon the wife's pledging the husband's credit and no neglect on the part of the husband in furnishing necessaries, there can be no liability on the part of the husband, and the burden of showing neglect upon the part of the husband is upon the creditor. Woodward v. Barnes, 43 Vt. 330 (1871); Keller v. Phillips, 39 N. Y. 351 (1868).

At the close of the evidence the plaintiff requested the judge to rule among other things, as follows: That the fact that the wife had a separate income—such fact being uncommunicated to the plaintiff—does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together.

With respect to this request the judge ruled that the noncommunication to the plaintiff of the fact that the wife had a separate income was immaterial. The judge found for the defendant and the plaintiff excepted.

MORTON, J.[4] * * * It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. Raynes v. Bennett, 114 Mass. 424; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Debenham v. Mellon, 6 App. Cas. 24; Jolly v. Rees, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing of certain things by the wife may constitute her his agent quoad such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. Debenham v. Mellon, ubi supra. This case, however, as already observed, stands on a different ground from either of those just referred to.

The plaintiff and his wife were living together, and he paid all of the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to do this though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them that it should be used by her in this manner. We do not see how, under such circumstances the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

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[4] Statement abridged and part of opinion omitted.

We do not mean to intimate that the fact that a wife has an income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See Thorpe v. Shapleigh, 67 Me. 235; Liddlow v. Wilmot, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

ANTHONY, COWELL & CO. v. PHILLIPS.

(Supreme Court of Rhode Island, 1890. 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182.)

Defendant's petition for a new trial.

STINESS, J. The plaintiffs sold and delivered the furniture sued for to the defendant's wife upon her order, and charged the bill to the defendant. They had previously made similar sales upon her order, and the defendant had paid the bills without objection. Upon one occasion the defendant had accompanied his wife to the plaintiffs' store, when a bill of goods was purchased, but at other times she was alone. At the time of the last sale the defendant and his wife had separated, and these goods were sent to the house where the wife was living apart from her husband, having left him, so far as appears, without justifiable cause. The plaintiffs did not know of the separation. The defendant requested the court below to instruct the jury as follows: "If the husband provided a suitable home according to his means for his wife, and she voluntarily left the same, without fault on his part, he was not liable for debts contracted by her while living apart from her husband, by reason of his being her husband, even though he had paid for goods ordered by his wife and delivered at their home while living together, whether the persons dealing with her had notice of the separation or not."

The court instructed the jury that if a woman lives apart from her husband by her own wrong, the husband is discharged from supporting her; but when a tradesman furnishes goods to a wife after separation, the husband having previously paid for goods furnished to her, the tradesman not knowing of the separation, and not having reasonable cause to know it, the agency may be presumed to continue until knowledge is brought home to the tradesman. Exception was taken to this instruction. We think the instruction as given was correct. A married woman may bind her husband for goods bought by her in two ways: For necessaries by reason of his obligation to support her when he omits or refuses to provide them under circumstances which make it his duty so to do; and for other things when she acts as his agent, under his authority, express or implied. In the former case she may bind him without, or even against, his personal authority, by what is termed her agency in law; in the latter case she can bind him only in the way that any person may bind another, by an agency in fact. The request made in this case related only to the marital obligation, and instruction was given substantially as requested. If the husband provided a suitable home for his wife which she voluntarily left, without fault on his part, it is clear that he would not be liable for goods furnished to her while away by reason of the fact of marriage. Debenham v. Mellon, L. R. 6 App. Cas. 24. The portion of the instruction excepted to covered the liability of the husband by reason of the agency of the wife.

The only question in this case, therefore, is, whether the plaintiffs might presume that the agency, evidenced by previous dealing, continued until they knew, or had reason to know, of the separation, or of a revocation of the agency. This question relates to the law of agency rather than to the relation of husband and wife. The liability of the husband in case of such agency was settled in the case of Manby v. Scott, 1 Sid. 109, 120, by the third resolution agreed to by the judges (2 Smith, Lead. Cas, Hare & Wallace notes, *418,) as follows: "III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his assumpsit in law, yet on his assumpsit in fact, whether the goods are for himself, or for his children, or for his family, all which positions are so obvious that they require no demonstration." If, then, the husband has held the wife out as his agent, by previous dealings, the person has the right to presume that the authority continues, until he has reason to know to the contrary. This is the well-established rule in cases of agency. See Story, Agency, § 470, and note; 1 Amer. & Eng. Encyclopædia of Law, 448, and cases cited. A familiar illustration of this rule is found in the case of a retiring partner. This was the substance of the instruction given to the jury, and it was therefore correct. Mickelberry v. Harvey, 58 Ind. 523; McGeorge v. Egan, 5 Bing. N. C. 196; Reid v. Teakle, 13 C. B. 627; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Cany v. Patton, 2 Ashm. (Pa.) 140.

Petition dismissed.[5]

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[5] In Debenham v. Mellon, when before the Court of Appeal, L. R. 5 Q. B. D. 394 (1880), Thesiger, L. J., said (page 403): "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband

GAFFORD v. DUNHAM.

(Supreme Court of Alabama, 1895. 111 Ala. 551, 20 South. 346.)

COLEMAN, J.[6] F. W. Dunham sued the appellant, F. H. Gafford, and his wife, M. B. Gafford, upon an account for groceries and supplies alleged to have been sold by one Boggan, the assignor of plaintiff. The uncontroverted evidence shows that the articles were sold to, and upon the sole credit of M. B. Gafford, the contract for their purchase was made with her only, and all payments which had been credited upon the account were made by her. The articles were charged to her, and the name of F. H. Gafford nowhere appears upon the books of account, nor is it pretended that at any time was he regarded as the debtor. After hearing the evidence, the court, without the intervention of a jury, rendered judgment in favor of M. B. Gafford, and against the husband, F. H. Gafford, who prosecutes the present appeal. At the trial the wife interposed the plea of coverture, and the failure of the husband to give his assent in writing to the contract. This plea was fully sustained by the evidence. We presume the court rendered judgment against the husband upon the ground that as the contract made with the wife was void, and as the evidence showed that the articles purchased were necessaries of life, and suitable to the degree and station in life of the wife of F. H. Gafford, his common law liability arose, and he was chargeable for such necessaries furnished to her. Considered with reference to the evidence as to the furnishing of the articles to the wife, or as to the common law liability of the husband for necessaries furnished to the wife, the conclusion of the court was erroneous. The common law liability of the husband for necessaries and suitable comforts has always rested upon the assumption that credit was given to the husband and not to the wife, and that the purchase was made with his implied assent. In no case did this liability arise when the facts showed affirmatively that credit was given to the wife and charged to her and not to the husband, and the goods were sold, not upon his implied assent that they were to be charged to him.—Hughes v. Chadwick, 6 Ala. 651; Pear-

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has paid him without demur in respect to such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume; just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from the tradesman, and whose authority he had secretly revoked."

Accord: M. ——— v. W. ———, 21 Misc. Rep. 656, 48 N. Y. Supp. 277 (1897); Hartjen v. Ruebsamen, 19 Misc. Rep. 149, 43 N. Y. Supp. 466 (1897); Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964 (1899).

[6] Part of the opinion is omitted.

son v. Darrington, 32 Ala. 231; O'Connor v. Chamberlain, 59 Ala. 431; Gayle v. Marshall, 70 Ala. 522. * * *

The judgment is reversed and a judgment will be here rendered in favor of the appellant.

Reversed and remanded.[7]

FEINER v. BOYNTON.

(Supreme Court of New Jersey, 1905. 73 N. J. Law, 136, 62 Atl. 420.)

GARRETSON, J. The plaintiffs recovered a judgment against the defendant in a District Court for the value of goods furnished. The defendant is, and at the time the goods were furnished was, a married woman living with her husband.

The goods furnished were for the personal use of the defendant.

It appears from the state of the case that the husband provided the defendant with money from time to time for her household and personal expenses; that the account with the plaintiffs had always been in the defendant's name; that the defendant paid the bills, of which there were a large number, during the 11 years through which the account had been running, with her own checks, drawn upon a bank where her husband had deposited money for her, of which deposit the plaintiffs had no knowledge at all; that the plaintiffs had never had any dealings with her husband; that the husband deposited various sums of money, ranging from $300 to $700, in the People's Bank of East Orange, and that the defendant drew her own checks against said accounts to pay for the various household expenses, as well as for her clothing; that she had a separate estate.

There is no evidence to show that the defendant ever made any express contract with the plaintiffs which would bind her separate estate, and the only evidence from which a contract could be inferred was that the goods were charged to the defendant on the plaintiffs' books and that the defendant paid the bills with her own checks, but there is nothing to show that the defendant knew that the goods were being charged to her by the plaintiffs, and the checks she gave in payment were of her husband's moneys, which had been deposited by her husband to pay for household expenses and her clothing.

A debt incurred for the necessary clothing of a married woman is presumably the debt of the husband, and if incurred by the wife it is presumed she is acting as the agent of her husband unless there is affirmative evidence to show that she intended to charge her separate estate.

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[7] Accord: Martin v. Oakes, 42 Misc. Rep. 201, 85 N. Y. Supp. 387 (1903). Contra: Edminston v. Smith, 13 Idaho, 645, 92 Pac. 842, 14 L. R. A. (N. S.) 871, 121 Am. St. Rep. 294 (1907).

In Wilson v. Herbert, 41 N. J. Law (12 Vroom) 454, 461, 32 Am. Rep. 243, it is held: "When husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent of her husband and regards him as the principal debtor. She may contract for such articles as principal and assume the responsibility of a principal debtor. But to fix upon her a liability, it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment exclusive of the liability of her husband."

The judgment of the District Court is reversed.[8]

BOLTON v. PRENTICE.

(Court of King's Bench, 1744. 2 Str. 1214.)

In assumpsit for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again.

After this the defendant and his wife cohabited together for a year, when without any cause appearing he left her, locked up her clothes, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay anybody that did. In this distress she borrowed clothes of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrongdoer, and therefore has no right to prohibit anybody. They distinguished this case from the case of Manby v. Scott, 1 Sid. 109, for there the wife was guilty of the first wrong in eloping.[9]

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[8] Accord: Ponder v. D. W. Morris & Bros., 152 Ala. 531, 44 South. 651 (1907); Hazard v. Potts, 40 Misc. Rep. 365, 82 N. Y. Supp. 246 (1903).

[9] In Olson v. Youngquist, 76 Minn. 26, 78 N. W. 870 (1899), the court, by Start, C. J., said: "There is no finding that the wife had actual authority

MORGENROTH v. SPENCER.

(Supreme Court of Wisconsin, 1905. 124 Wis. 564, 102 N. W. 1086.)

Action to recover for professional services performed by the plaintiff, a physician, for the wife of the defendant. The action was tried by the court and a jury and a verdict was directed for the plaintiff. The defendant appeals.

KERWIN, J.[10] [after stating the facts, continued as follows:]

While there is evidence on the part of the plaintiff tending to show that the wife was living apart from defendant with his consent and that he assented to the employment of plaintiff, yet it is not sufficient to justify the court in taking the case from the jury. From a careful examination we find there is ample evidence to support a finding to the effect that the wife of defendant was living separate and apart from her husband without his consent, and without cause, at the time the services were performed.

Plaintiff contends that the medicines and services furnished were necessaries which defendant was bound to provide, and it is doubtless upon this theory that the court below directed a verdict for plaintiff. When the defendant's wife deserted him without cause, and continued to live apart from him without his consent, she did not take with her the defendant's credit. Her misconduct deprived her of power to bind her husband, and it was incumbent upon plaintiff to prove her authority, in order to make out a case against defendant. Schouler, Dom. Rel. § 69. Prima facie, a woman living separate and apart from her husband has no power to bind him, and it is incumbent upon the person furnishing necessaries to a wife so living apart from her husband to show that she is so living for justifiable cause. Inhabitants

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express or implied, to pledge her husband's credit for the goods, or that the defendant had refused or neglected to provide a suitable support for his wife and family. Therefore the facts found do not justify the legal conclusion that the defendant is liable for the value of the goods sold to his wife. Counsel for plaintiff, however, claims that the finding that the goods were necessaries and that the husband had not furnished them, necessarily includes a finding that he had been derelict in his duty, and had neglected or refused to furnish a suitable support for his wife. The finding cannot be so construed. It is not reasonable to infer, from the simple fact that the goods were necessaries, that the husband had refused or neglected to provide for his wife, in the absence of any finding that he had been requested to furnish them, or at least that he knew or ought to have known that his wife and family were in need of the goods."

In Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333 (1901), the court, by Brown, J., said: "The wife is not required, where the husband refuses to permit her to live with him, to submit to his dictates as to where she shall live. She may go where she pleases, so long as the place selected by her is respectable, and the expense thereof does not exceed proper limits, taking into consideration the financial circumstances of the husband."

Where a husband connives at the adultery of his wife and turns her out, he is liable for necessaries furnished her. Wilson v. Glossop, 19 Q. B. D. 379 (1887).

[10] Statement abridged and part of the opinion omitted.

of Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669. In the case at bar, if the wife of defendant was living separate and apart from him without cause and without his consent, and he did not authorize the employment of plaintiff, plaintiff cannot recover. Sturtevant v. Starin, 19 Wis. 268; Brown v. Worden, 39 Wis. 432. Upon the facts proved, it was a question for the jury to determine whether a rupture had taken place between husband and wife, of such a nature as to deprive her of authority to pledge his credit for necessaries supplied. Crocker v. Napper, 16 Law T. 295; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373. * * *

It follows that the court erred in directing a verdict for the plaintiff.[11]

HUNT v. HAYES.

(Supreme Court of Vermont, 1891. 64 Vt. 89, 23 Atl. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917.)

General assumpsit. Plea, the general issue. Trial by jury at the December term, 1889, Windsor county; Taft, J., presiding.

The plaintiff was the father of the defendant's wife, and brought this suit to recover for necessaries furnished in the support of his daughter and her infant son who were residing in the plaintiff's family. It was conceded by the defendant that the items sued for were necessaries, and that the wife was living apart from her husband under such circumstances as would justify her in pledging his credit for necessaries, unless she was prevented from doing so by the fact that she had other means of support; and the defendant introduced evidence of an antenuptial agreement by which it was provided that he would pay to his wife the sum of $2,000 annually. The plaintiff upon his part conceded that the $2,000 had been regularly paid, but contended that the defendant was liable for the support of his wife and infant son notwithstanding.

The court ruled that the defendant was liable to the same extent and in the same manner as though no ante-nuptial agreement had been made, to which the defendant excepted.

Inasmuch as both parties desired a determination of this question before a trial was had upon the merits of the case, the case was withdrawn from the jury, and the defendant's exceptions certified to the Supreme Court.

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[11] Accord: Vusler v. Cox, 53 N. J. Law, 516, 22 Atl. 347 (1891); Peaks v. Mayhew, 94 Me. 571, 48 Atl. 172 (1901); Steinfield v. Girrard, 103 Me. 151, 68 Atl. 630 (1907); Constable v. Rosenor, 178 N. Y. 587, 70 N. E. 1097 (1904). But see Button v. Weaver, 87 App. Div. 224, 84 N. Y. Supp. 388 (1903).

A husband has been held not liable to pay the trustees of the county asylum for the support of his insane wife in the asylum to which she had been committed by the proper public authorities. Richardson v. Stuesser, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829 (1905); County of Delaware v. McDonald, 46 Iowa, 170 (1877); Baldwin v. Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850 (1893). But see Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259 (1882).

The child referred to was a son of the defendant, born June 7, 1888, who had lived at the plaintiff's house with his mother.

ROWELL, J. The authority of a wife to pledge the credit of her husband for necessaries is usually regarded as delegated authority and not as an inherent authority; and it is considered that if she binds him at all in this behalf she binds him only as his agent. But this authority or agency may be a presumption of law as well as an inference of fact; and it must be a presumption of law when an agency in fact, express or implied, is either not proved or is expressly disproved, as is often the case. Thus, in Harrison v. Grady, 13 Law T. (N. S.) 369, it is said that when a wife is turned out of her home without the means of obtaining necessaries, it is an irrebuttable presumption of law that she has her husband's authority to pledge his credit for necessaries; but that when husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment that are suitable to the station that he allows her to assume, but that if they are not suitable to that station, a presumption arises that she was not his agent to pledge his credit for them. So in Read v. Legard, 6 Exch. 636, where a husband was made liable for necessaries supplied to his wife during the period of his lunacy, Baron Alderson, says: "If a wife is compelled by her husband's misconduct to procure necessaries for herself; as, for instance, if he drives her away from his house, or brings improper persons into it, so that no respectable woman could live there, then, according to the adjudged cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives her authority by force of the relation of husband and wife." Baron Martin said that this is the true foundation of the liability, namely, that by contracting the relation of marriage, a husband takes upon himself the duty of supplying his wife with necessaries, and that if he does not perform that duty, either through his own fault or in consequence of a misfortune of the kind in that case, the wife has, by reason of the relation, an authority to procure them herself, and that the husband is responsible for what is so supplied.

This doctrine is pretty satisfactory; but we should be quite as well satisfied to say that in such cases the law treats the husband just as though he had in fact given the wife authority; the same as in the case of an implied promise, where the law does not really go upon the ground of a promise, but treats the party just as though he had promised; and this is what is meant by an implied promise.

That a wife, wrongfully turned away by her husband without the means of supplying herself with necessaries, may pledge his credit for them, is undeniable. But the question we have to consider is, whether, when thus turned away, she can pledge her husband's credit for necessaries when she has an adequate income of her own with which she can supply herself.

The earliest case we have found on this question is Warr v. Huntly, 1 Salk. 118, which is this: An ordinary working man married a woman of like condition, and after cohabiting for some time the husband left her, and during his absence the wife worked, and this action being brought for her diet, it was held by Lord Holt that the money she earned should go to keep her. The principle of this case is recognized in Johnston v. Sumner, 3 Hurl. & N. 261, though the case itself is not referred to. Pollock, C. B., there says: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for by law she has no property, and may not be able to earn her living; but we should hesitate to say, if a laboring man turned his wife away, she being capable of earning and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount,—that in such cases the wife could bind the husband." But a precarious income is not enough. Thus, in Thompson v. Hervey, 4 Burr. 2177, the wife, who had been sent adrift, had a pension of £300 a year from the Crown, granted to her in her own name, but determinable at the pleasure of the Crown; and it was held that she could pledge the husband's credit notwithstanding, for that the pension, being only a voluntary grace and bound only during the pleasure of the Crown, was not what any creditor of hers could be supposed to give her credit upon.

Liddlow v. Wilmot, 2 Stark. 86, is much relied upon by the defendant, and strongly denied to be in point by the plaintiff. But we think it in point. The original cause of the separation, which took place thirty years before suit brought, did not appear, but a reason for its continuance did appear, for the defendant had long cohabited with another woman, by whom he had a daughter twenty-five years old, consequently the wife was necessarily away: and this is what is said of the case in Johnston v. Sumner. So it was not a case of separation by mutual consent, as clearly appears by what was said in summing up. The wife had adequate means of her own, but it does not appear whence she derived them, much less that she derived them from her husband by way of an allowance on separation, as is claimed in argument to be the fair inference from the facts stated. Nor is there anything to show that the wife had forfeited her conjugal rights. Lord Ellenborough, in summing up, said: "The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation; but if either from her husband or from other sources, she was possessed of such means, the law gives no remedy against the husband, but the idea of an implied credit is repelled." And this is undoubtedly the law of England. Blackburn, J., in Bazeley v. Forder, 9 Best & S. 599, puts it thus: "A wife when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, unless she is in some other way supplied with the means of providing them." In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the cases do put it—Eastland v. Burchell, L. R. 3 Q. B. Div. 432—it logically follows that when there is no necessity there can be no agency, for cessante ratione legis cessat ipsa lex; and there can be no necessity when the wife has means of her own with which she can supply herself.

Clifford v. Laton, 3 Carr. & P. 15, is understood by some to be to the same effect as Liddlow v. Wilmot. Mr. Smith so regards it in his 2 Lead. Cas. 438. It is so digested in 4 Jacob's Fisher's Digest, pl. 6041. And in Johnston v. Sumner, Pollock, C. B., cites it in connection with Liddlow v. Wilmot, and to the same proposition. And it is quite susceptible of the construction they give it, although it must be admitted that as the case is reported in Carrington & Payne that point does not very clearly appear.

In Litson v. Brown, 26 Ind. 489, it is held that if a wife living apart from her husband for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and that the husband cannot be made liable except on an express promise to pay. Mr. Schouler, in his work on Husband and Wife, § 117, seems to recognize this case as law, for he cites it in support of the proposition that when a husband by his misconduct compels his wife to live apart from him, he is liable for her necessaries notwithstanding his allowance, as long as that allowance is insufficient and she has no proper means of support. And we do not think that he elsewhere in his work controverts this doctrine. True, he says that ante-nuptial settlements cannot vary the terms of the conjugal relation, nor add to nor take from the personal rights and duties of the husband and wife. But he is speaking generally, and without reference to the question we are considering; and what he says is true as a general proposition, both in England and in this country. Indeed we find little or no authority in this country opposed to the view here taken of this question.

But in cases like the one before us it is for the jury to say whether the wife has adequate means or not for her support.

As to the defendant's liability for the support of his child, it does not appear why the child is with the mother, whether with defendant's consent and approval or against his will and wishes. It may be with her in a way to charge the defendant for its support; but whether it is or not we cannot determine on this record. As to the law of the subject, see Rawlyns v. Vandyke, 3 Esp. 250; Bazeley v.

Forder, 9 Best & S. 599; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Reynolds v. Sweetser, 15 Gray (Mass.) 78. The case of Gordon v. Potter, 17 Vt. 348, which holds that a father is not liable for necessaries furnished to his minor child except upon his promise, express or implied, to pay for them, is not opposed to these cases, for they also go upon the ground of an implied promise.

Judgment reversed and cause remanded.

MUNSON, J., dissents.

OTT v. HENTALL.

(Supreme Court of New Hampshire, 1899. 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.)

Assumpsit. Facts found by the court. The defendant so treated his wife as seriously to injure her health, in consequence of which she left him. After this, the plaintiffs furnished her, at her request, medical attendance, nursing, and board, she pledging the defendant's credit for the same. Hutson made a bill against the wife, but was told by her that the defendant was obliged to pay it. The services, etc., were necessary for her recovery, and were adapted to her condition. Each of the plaintiffs knew that she was living apart from her husband. She had $700 or $800 on deposit in a savings bank. A feeble-minded son was partially dependent upon her for support. Judgments are to be rendered for the parties entitled to them upon the foregoing facts.

CHASE, J.[12] * * * There are authorities which hold that where necessaries are furnished a wife living apart from her husband without her fault, and she has funds of her own, the liability of the husband depends upon the question of fact whether her means are adequate to her support. Liddlow v. Wilmot, 2 Stark. 86; Dixon v. Hurrell, 8 Car. & P. 717. The defendant relies upon Hunt v. Hayes, 64 Vt. 89, 23 Atl. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917, and Litson v. Brown, 26 Ind. 489, in support of this proposition. [The court then reviewed these cases in detail and continued as follows:]

Concerning the reasons given for the decisions in these cases, it is sufficient to say that they seem to be inconsistent with the character of the obligation which the law imposes upon the husband as a part of the marriage relation. Marriage is founded on the idea that the parties will establish a home and rear a family. The husband is by nature, as well as by law, the leading and responsible party in the undertaking. Among other things, he takes upon himself the duty of providing a home and suitably maintaining the wife and children. The wife's ability to provide herself with the necessaries of life does not relieve him from the duty while they live together; and no good reason is perceived why it should do so while she is living apart from him in consequence of his misconduct. The duty is taken into consideration in awarding alimony to the wife in connection with or after a divorce. Morrison v. Morrison, 49 N. H. 69, 73; Janvrin v. Janvrin, 59 N. H. 23. If the wife does not desire a divorce, or the husband's misconduct has not continued a sufficient length of time to constitute a cause for divorce, the court, upon petition of the wife, "may make to her reasonable allowance out of the estate of the husband for the support of herself and children." Pub. St. c. 176, § 4. The fact that the wife has means of her own does not deprive her of the right to alimony in the one case, or to an allowance in the other. So far as her right and the husband's correlative duty are concerned, the necessity for clothing her with authority to obtain necessaries upon the husband's credit exists when she has means the same as when she has none. This is the necessity upon which the law bases the husband's implied promise when he fails in the performance of his duty.

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[12] Statement abridged and part of opinion omitted.

It follows from the foregoing considerations that the statutes of the state enabling married women to hold to their own use property acquired by them, and enlarging their rights and liabilities, do not affect this question. These statutes have not taken away the right of either party to the marital contract, to have the affection, society, and aid of the other. Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597. While the wife is at liberty to provide herself, her husband, or her children with the necessaries of life, at her own expense or upon her own credit, the duty of supplying them rests by law upon the husband. Parsons v. McLane, 64 N. H. 478, 479, 13 Atl. 588. The circumstances disclosed in this case were such that the defendant's wife had authority to pledge his credit for the necessaries which she obtained from the plaintiffs. Whether she did so was a question of fact which has been determined in the plaintiffs' favor. Hutson's bill against the wife was not conclusive evidence upon the question. Walker v. Richards, 41 N. H. 388. The plaintiffs are entitled to judgments.

[Balance of opinion omitted.]

EASTLAND v. BURCHELL.

(High Court of Justice, 1878. L. R. 3 Q. B. Div. 432.)

Lush, J. The questions arising in this appeal are: 1st, whether the defendant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October, 1877, under the circumstances stated in the case; and, 2ndly, whether the county court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the defendant was; the ground of rejection being, that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The defendant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the defendant taking charge of the four elder children, the three younger ones remining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed, by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was, or should thereafter become possessed or entitled, and the savings of all income. The defendant covenanted to pay to the trustee £5. a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the £5. per quarter, and not apply to the defendant for any further pecuniary assistance, and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the defendant had paid the £5. per quarter up to a period subsequent to the accruing of the debt in question.

The plaintiff had never known the defendant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods supposing her to be a married woman, but without making any inquiries in the matter. The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation, in receipt of her separate income, which brought in £297. 15s. 2d. per annum, and the £20. a year paid by the defendant; and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express term of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is the stipulated allowance. He can derive no authority from the wife, which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to shew that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him.

We need only refer to the two more recent cases of Johnston v. Sumner, 3 H. & N. 261, 27 L. J. (Ex.) 341, and Biffin v. Bignell, 7 H. & N. 877, 31 L. J. (Ex.) 189.

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the defendant is not liable for the debt contracted with the plaintiff.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial.

We therefore act upon the wholesome provision of the Judicature

Act, 1875, Order XL., Rule 10, and direct that the judgment for the plaintiff below, be set aside, and judgment be entered for the defendant.

Judgment for the defendant.

KENYON v. FARRIS.

(Supreme Court of Errors of Connecticut, 1880. 47 Conn. 510, 36 Am. Rep. 86.)

Bill in equity to recover money advanced to the wife of the respondent for the purchase of necessaries by her while deserted by her husband. The respondent demurred and the demurrer was sustained and the petition dismissed. The petitioner brought the record before this court by a motion in error.[13]

PARDEE, J. This is a bill in equity. The petitioner alleges that on or about the first day of March, 1876, the respondent wilfully deserted his wife, she being without fault; that thereafter he neglected and refused to furnish means necessary for her support; that she was without means of support and was in need of the necessaries of life; that at her request during the time of such need the wife of the petitioner advanced from her separate estate from time to time sums of money aggregating $800 to the respondent's wife for the purpose of enabling her to procure the necessaries of life; and that she expended the money in the purchase for herself of such necessaries as her husband was legally bound to furnish. And the petitioner alleges that he brings this bill as trustee for his wife; and that he is without adequate remedy at law. He prays to be subrogated to the rights of the several persons who sold these necessaries to the respondent's wife; and that the respondent be ordered to pay said amount to him as such trustee; or that relief should be granted in some other manner.

The following cases are precedents for this bill:

In Harris v. Lee, 1 P. Wms. 482, the petitioner had loaned £30. to the respondent's wife who had left him for cause, to enable her to pay doctors and for necessaries. The court said:—"Admitting that the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her use and for necessaries, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons could be creditors of the husband, so the plaintiff shall in their place and be a creditor also; and let the trustees pay him his money and likewise his costs." And in Marlow v. Pitfield, 1 P. Wms. 559, the court said:—"If one lends money to an infant to pay a debt for necessaries and in consequence thereof the infant does pay the debt, here although he may not be liable at law, he must nevertheless be so in equity."

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[13] Statement abridged.

In Dean v. Soutten, 9 L. R. Equity Cases, 151 (1869), the marginal note is as follows:—"A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband." In giving the decision Lord Romilly, M. R., said:—"I am of the opinion that this is a proper suit and that the plaintiff is entitled to a decree. The cases cited on behalf of the defendant have no application, and May v. Shey, 16 Sim. 588, is overruled by Jenner v. Morris, supra."

Jenner v. Morris, 3 De G., F. & Jones, 45, was a bill to compel the payment of money advanced to a deserted wife. In giving the opinion the Lord Chancellor said:—"An action at law could not be maintained for such a claim. Those who supply the necessaries to the deserted wife may sue the husband at law, she being considered his agent with uncountermandable authority to order the necessaries on his credit. But courts at law will not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessaries or pays the trades-people who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the trades-people who furnished the necessaries, and to have a remedy for the amount against the husband. I do not find any technical reason for this; but it may be possible that equity considers that the trades-people have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries, and that although a chose in action cannot be assigned at law, a court of equity recognizes the right of an assignee. Whatever may be the reason, the doctrine is explicitly laid down in Harris v. Lee, 1 P. Wms. 482, and the other cases referred to. Objection has been made to these authorities that they are very old, and that they do not appear to have been acted upon in modern times. But it may be said, on the other hand, that they have been acted upon without ever having been questioned, and that they are entitled to more respect from their antiquity. I find that they are cited and treated as good law by subsequent text writers on this subject. Considering that to establish the equitable liability of the husband, proof is required that the money has been actually applied to the payment of the debt for which the husband would be liable at law, no hardship or inconvenience can arise from adhering to this doctrine.

In Walker v. Simpson, 7 Watts & Serg. (Pa.) 83, 42 Am. Dec. 216, the court said:—"Although the husband is to blame for having caused the separation, yet he is only chargeable at law for the necessaries supplied to his wife at her request, and not with money lent or advanced to her, because money cannot be considered necessaries, which consist of food, lodging, and raiment. But where the money lent or advanced has been applied to the payment of necessaries furnished to her, equity will put the party lending or advancing the money in the place of the party who supplied the necessaries."

We willingly follow the leading of these authorities, because we think that the line of separation between necessaries and money loaned for the purpose of purchasing them may well be obliterated. So far as the husband is concerned they are practically convertible terms. His burthen will not be increased if he is made liable for the money; the scope of the word necessaries will not thereby be broadened; the lender will be compelled to prove an actual expenditure for them; the law has discharged its duty to the husband in protecting him from liability for anything beyond them; it only discharges its duty to the wife by making it impossible for him to escape liability for these irrespective of the method by which he forces her to obtain them. If he has any preference as to that method the law will secure it to him; if he refuses to adopt any, he is not to be heard to complain if she is permitted to elect, providing always that she is kept within the small circle of necessity. It is not certain that credit will, under all circumstances, supply necessaries to the wife; at times they may not be had without money, and accidents of time, place or distance may bring about such a state of things as that a friend may be able and willing to place money in her hands upon her husband's credit, who cannot personally attend to its disbursement.

There is error in the judgment complained of.[14]

In this opinion the other judges concurred; except Carpenter, J., who having tried the case in the court below did not sit.

SKINNER v. TIRRELL.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673, 38 Am. St. Rep. 447.)

MORTON, J. This is a bill in equity, in which the plaintiff, who has advanced money to the defendant's wife while living apart from her husband, which she expended, it is alleged, in the purchase of necessaries, seeks to be subrogated to the rights of the persons furnishing the necessaries, and prays that the defendant may be ordered to pay to her the amount so advanced. The defendant demurred to the bill. The demurrer was sustained and the bill was dismissed, and the plaintiff appealed.

The demurrer was a general one, and it was claimed at the argument, as one ground of it, that the bill did not set out sufficient facts to show that the wife was living apart from her husband for justifiable cause. Without consideration whether this objection was well taken, we assume that, if valid, it could be removed by amendment. The question then is whether the bill, if amended so as to remove this objection, can be maintained either on the ground of subrogation or on the ground of a general equity. We think it cannot stand on either.

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[14] Accord: Reed v. Crissey, 63 Mo. App. 184 (1895); Leuppie v. Osborn, 52 N. J. Eq. 637, 29 Atl. 433 (1894); Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216 (1844).

There can be no subrogation unless there is something to be subrogated to. A debtor or liability cannot be created where none existed for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with necessaries. The goods were sold to her and were paid for by her. They were not furnished on the defendant's credit, but on the wife's. The money that was advanced by the plaintiff was not advanced to the parties who furnished the necessaries, but to the wife, to be expended by her as she saw fit. There is no ground, therefore, for the application of the doctrine of subrogation. Although the right of subrogation does not depend on contract, but rests on natural justice and equity, there must be either an agreement, express or implied, to subrogate, or some obligation, interest, or right, legal or equitable, on the part of the party making the payment or advance in respect of the matter concerning which payment is made or money advanced, in order to entitle him to subrogation. Hart v. Western Railroad, 13 Metc. 99, 46 Am. Dec. 719; Amory v. Lowell, 1 Allen, 504; Wall v. Mason, 102 Mass. 313; Ætna Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Gans v. Thieme, 93 N. Y. 225, 232; Arnold v. Green, 116 N. Y. 566, 23 N. E. 1; Nolte v. Creditors, 7 Mart. (N. S., La.) 602; Johnson v. Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83; McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335; Miller's Appeal, 119 Pa. 620, 13 Atl. 504; Suppiger v. Garrels, 20 Ill. App. 625; Gadsden v. Brown, Speers, Eq. (S. C.) 37, 41; De Concilio v. Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383; Brewer v. Nash, 16 R. I. 458, 462, 17 Atl. 857, 27 Am. St. Rep. 749; Blackburn Building Society v. Cunliffe, 22 Ch. D. 61; Stevens v. King, 84 Me. 291, 24 Atl. 850; Sheldon on Subrogation, §§ 2, 3, 240.

A mere volunteer is not entitled to subrogation. Ætna Ins. Co. v. Middleport, Arnold v. Green, and Gadsden v. Brown, ubi supra; Sheldon on Subrogation, §§ 241, 242, and cases cited. Nor is one who lends money to another to pay a debt entitled as a matter of right to stand in the creditor's shoes. Sheldon on Subrogation, §§ 241, 242, and cases cited. So far as subrogation is concerned, the plaintiff's contention resolves itself into the proposition that the defendant's wife could have bought on her husband's credit the necessaries which she purchased and paid for with the money advanced to her by the plaintiff; that if the plaintiff had paid the parties supplying the necessaries their several demands, she would have been entitled to be subrogated to their claims against the defendant; and that therefore a decree should be entered in her favor against the defendant in this suit. If the premises are correct, manifestly the conclusion does not follow from them.

There are ancient and modern cases in England which hold that a person advancing money to a married woman under circumstances like those in this case can recover the same of the husband in equity. Harris v. Lee, 1 P. Wms. 482; Marlow v. Pitfield, 1 P. Wms. 558; Deare v. Soutten, L. R. 9 Eq. 151; Jenner v. Morris, 3 De G., F. & J. 45. See, also, In re Wood, 1 De G., J. & S. 465.

These cases have been followed in this country in Connecticut (Kenyon v. Farris, 47 Conn. 510, 36 Am. Rep. 86), and there is a dictum in a case in Pennsylvania. Walker v. Simpson, 7 Watts & Serg. (Pa.) 83, 42 Am. Dec. 216. To the same effect certain text writers, also following the English cases, have stated the law to be as there held. 1 Bish. Mar., Div. & Sep. §§ 1190, 1191; Pom. Eq. Jur. §§ 1299, 1300; 2 Kent, Com. 146, note; Schouler, Domestic Relations, § 61, note. But those cases do not appear to us to rest on any satisfactory principle. It was apparently conceded by the Lord Chancellor in Jenner v. Morris, supra, that they did not. He seems to have yielded to them simply as precedents which he was bound to follow. The earliest one, Harris v. Lee, on which the subsequent ones rely, referred the jurisdiction, without much discussion or consideration of it, to the principle of subrogation. For reasons already given, we think that principle inapplicable. It is said that equity has jurisdiction, because there is no remedy at law. It is admitted that there is none at law.[15] But it is contended that the defendant was bound to furnish his wife with necessaries; that the money which the plaintiff advanced to her was actually expended in good faith by her for necessaries; that it will be no hardship upon the defendant to be obliged to pay for necessaries which the law would have compelled him to furnish; and that in the interests of justice equity should compel him to pay the plaintiff the sums which she has advanced. In effect this is the same as saying that in equity money advanced to a wife living separate from her husband and for justifiable cause, and expended by her in good faith in the purchase of necessaries, should itself be regarded as necessaries and recoverable accordingly. At law it is clear that money is not necessaries, and that a married woman living separate from her husband cannot borrow money on his credit to purchase necessaries. What is necessaries must be the same in equity as at law. It cannot be one thing on one side of the court and another thing on the other. There may be strong reasons why married women, compelled by their husbands' misconduct to live apart from them, should be allowed to borrow money on their husbands' credit for the purchase of necessaries. It is for the Legislature, if it deems it advisable, to give them such power. In this State they are not without a remedy in such cases. The Probate Court may, upon their petition, order the husband to pay to them from time to time such sums of money as it deems expedient for their support. Pub. St. c. 147, §§ 33 et seq. It is possible that this statute should be taken as a declaration of the legislative sense that a married woman living apart from her husband should obtain money for necessaries through the aid of the Probate Court, and not by pledging his credit. However that may be, a majority of the court can discover no satisfactory ground on which jurisdiction in equity of the present suit can rest. Decree affirmed.

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[15] But see Kenny v. Meislahn, 69 App. Div. 572, 75 N. Y. Supp. 81 (1902)

TROTTER v. TROTTER.

(Supreme Court of Illinois, 1875. 77 Ill. 510.)

Appeal from the Circuit Court of Wayne county; the Hon. Tazewell B. Tanner, Judge, presiding.

This was a bill in chancery, by Mary A. Trotter, against John Trotter, Zadoc C. Reynolds, Calvin P. Thomasson, William J. Sailor, and Edward Bonham, for a separate maintenance, and for an injunction.

The bill alleges that on July 14th, 1874, while complainant and her husband were residing in the State of Kansas, the latter deserted her, and has since failed to provide for her, etc., and went away with one Mary J. Myers; that John Trotter has money in bank to the amount of $1,700, and has money and notes in the hands of Thomasson to the amount $1,800. The bill prays for a discovery of the moneys, etc., in the hands of the other defendants, and that they be enjoined from paying the same to John Trotter, and for a decree for a separate maintenance.

The court below decreed that Thomasson pay the complainant $100 money admitted to be in his hands, and continued the cause.

Mr. Justice SCHOLFIELD delivered the opinion of the Court:

The question presented by this record is, can a married woman, under the law now in force in this State, bring a bill for maintenance against her husband, where she seeks no other relief.

The right to alimony, under such circumstance, was not recognized at common law; but the proper remedy, where the husband deserted his wife, and refused to supply her with necessaries according to her rank and condition, was by an action at law by the person supplying such necessaries for her. Where a separate maintenance was granted the wife, it was always as incidental to some other relief, as in case of divorce, or supplicavit for security of the peace, against her husband, etc. Story's Equity Jurisprudence, vol. 2, § 1422; Bishop on Marriage and Divorce, §§ 549 to 552.

In some of the States, a different rule has obtained, and alimony has been allowed on bill filed for that purpose alone. Purcell v. Purcell, 4

Hen. & Munf. 597; Galland v. Galland, 38 Cal. 265; Graves v. Graves, 36 Iowa, 310, 14 Am. Rep. 525. But except in so far as this is authorized by statute, the decisions are against the current of the authorities, and the rule they recognize is an evident departure from principle. Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Peltier v. Peltier, Har. (Mich.) 19; Rees v. Waters, 9 Watts (Pa.) 90; Pomeroy v. Wells, 8 Paige (N. Y.) 406; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; McGee v. McGee, 10 Ga. 477; Doyle v. Doyle, 26 Mo. 545; Yule v. Yule, 10 N. J. Eq. 138.

It is said, in Bishop on Marriage and Divorce, § 374, that "as a general proposition, a decree for separation in favor of the wife, must be attended, if she asks it, by a decree for alimony; and upon the same principle rests the better and general doctrine already discussed, that no court can grant alimony when it is the only thing sought; because, in the nature of the case, an adjudication allowing the wife to live separate from the husband, is a necessary foundation for an adjudication compelling him to pay her a separate support. His ordinary duty is to maintain her in cohabitation with him, not otherwise; and the court can not adjudge him obligated to do it in separation, until it adjudges that she may live separate."

The first section of the "act in relation to married women," approved March 5, 1867, authorized married women who, without their fault, lived separate and apart from their husbands, to have a decree against their husbands for reasonable support and maintenance, while they so lived separate and apart. Laws 1867, p. 132. But this act is expressly repealed by the 5th section of chapter 131, Revised Statutes of 1874, p. 1035, and the question is left as it was prior to that enactment.

The 11th section of chapter 68, Revised Statutes of 1874, only authorizes the husband or wife, when abandoned by the other, who leaves the State, and is absent therefrom for one year, without providing for the maintenance and support of his or her family, or is imprisoned in the penitentiary, to apply to any court of record in the county where the husband or wife so abandoned, etc., resides, and have a decree authorizing him or her to manage, control, sell and incumber the property of the other, etc. Neither the allegations in the bill, nor the facts proved, bring the case within this section.

We are of opinion the decree of the court below is unauthorized by the law in force when the proceeding was instituted and the decree rendered, and it must, therefore, be reversed.

Decree reversed.

DECKER v. KEDLY.

(Circuit Court of Appeals, Ninth Circuit, 1906. 148 Fed. 681, 79 C. C. A. 305.)

Action against defendant to recover damages. Defendant demurred to the complaint on the ground that it stated no cause of action. The demurrer was sustained. Judgment for the defendant. Writ of error.[16]

GILBERT, Circuit Judge. This case may be disposed of in a few words. A woman sues a man for damages on the ground that the latter, during the time while he was her husband, wantonly refused to supply her with the necessaries of life. The allegations of the complaint leave it uncertain whether at the time of bringing the action the parties thereto had been divorced. It is not important to the decision of the question here involved whether there had or had not been a divorce. In either case the allegations of the complaint present no cause of action. It is true that the statutes of Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture, and declare that neither the husband nor the wife shall have an interest in the property of the other, provide that should either obtain the possession of the property of the other the latter may maintain an action therefor in the same manner and to the same extent as if they were unmarried, and make further provision that neither shall be liable for the other's debts. Such statutes do not mean that the husband is answerable to the wife in damages for failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is enough to say, has not been conferred by the statutes of Alaska, is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence.

The judgment of the District Court is affirmed.

In re RYAN'S ESTATE.

RYAN v. DOCKERY.

(Supreme Court of Wisconsin, 1908. 134 Wis. 431, 114 N. W. 820, 15 L. R. A. [N. S.] 491, 126 Am. St. Rep. 1025.)

Edward Ryan filed a claim in the County Court against the estate of his deceased wife for care, support and nursing of said wife from the time of their marriage up to the time of her death. The claim was allowed. Upon an appeal to the Circuit Court the complaint was amended so as to allege that just prior to the marriage of the parties and on the same day the deceased agreed with the plaintiff that in consideration of his services in caring for, supporting and nursing her she would leave him all her property upon her death should he survive her; that she failed to perform such promise to the claimant's damage of $1750. A judgment was entered for the claimant for nominal damages and costs. The claimant appeals.

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[16] Statement abridged.

WINSLOW, C. J.[17] * * * One consideration alone disposes of the plaintiff's claim adversely to him. The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. Schouler, Dom. Rel. (5th Ed.) § 171; 21 Cyc. 1242. It results from this that, when the plaintiff promised to care for, nurse, and support the deceased after marriage, he promised only to do that which the law required him to do in any event, and neither the doing of what one is in law bound to do nor the promising so to do is any consideration for another's promise. 1 Page on Cont. § 311; Post v. Campbell, 110 Wis. 378, 85 N. W. 1035. The alleged promise of the deceased was therefore nudum pactum. The plaintiff simply performed duties required of him by law as a husband which he could not avoid or contract away, and there can be no recovery upon express contract, nor will the law imply a contract.

Judgment affirmed.

SMYLEY v. REESE.

(Supreme Court of Alabama, 1875. 53 Ala. 89, 25 Am. Rep. 598.)

Smyley, as the administrator of his deceased wife's estate, claimed credit of $175 funeral expenses of the wife paid by him, and also $500 paid by him for a monument erected over her grave, by his direction. The funeral expenses and monument were suitable to the estate and condition in life of the deceased, and Smyley acted in entire good faith in paying these amounts. There was no evidence as to the husband's means or condition at the time of the wife's death. The court refused to allow a credit for these items. Smyley excepted.[18]

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[17] Statement of facts abridged and part of opinion omitted.

[18] Statement abridged.

BRICKELL, C. J. 1. The statutes creating the separate estates of married women, deprive the husband of rights which would have accrued, and could have been asserted at common law. They do not absolve him from the duties the common law imposes. Rogers v. Boyd, 33 Ala. 175. The common law compelled him to maintain his wife—to supply her with the necessaries suitable to her situation, and corresponding with his social position, and the degree of his fortune. If the husband neglects this duty the wife may on his credit, against his will, obtain necessaries, and he will be liable for them. In such case she is presumed to have authority to bind him, but the presumption is made only to enforce a performance of the duty. Schouler's Dom. Rel. 85; 2 Kent, 128; Tyler on Inf. and Cov. 340. This duty of the husband did not arise from, nor was it solely dependent on, the common law principle, that marriage was a gift to the husband of the wife's estate—that he thereby became vested with an ownership, qualified or absolute, of her property, and rights of property. The duty was as obligatory on the husband, to whom the wife brought no portion, as on him who received the largest fortune. It was a consequence of the merger of the legal existence of the wife, in that of the husband. The marriage relation contemplates that the husband and wife shall live together, and "the power of umpire must be placed in the hands of the one or the other of them." This power, which is the power to rule the household, is committed to the husband. The wife is in subjection to, and dependent on, the husband; and from this subjection and dependence springs the duty to maintain her; as from the same relation of subjection and dependence arises the duty of maintaining the offspring of the marriage. The common law permitted parties entering into the marriage relation, to separate the wife's property from the husband's, and by contract to exclude the rights the husband would have otherwise acquired therein. From a separate estate thus created, the wife was not compelled to make any appropriation for her own support—nor had the person supplying her necessaries in the absence of a contract, express or implied, made by the wife, any equity to charge it. Gunn v. Samuels, 33 Ala. 201; 1 Bishop, Rights of Married Women, 895. The statutes creating separate estates, allow them to be charged for necessaries in the narrowest sense of that term. Such articles "of comfort and support of the household," "as the husband may be charged with in invitum—such necessaries for the maintenance and comfort of the family, as, in the absence of a proper provision by him, his wife, or even a stranger, may supply to the family, and thereby fix a liability on him." Durden v. McWilliams, 31 Ala. 438. The husband is not relieved from his liability for such necessaries. The measure of his duty to furnish them, is the extent of the liability of the separate estate. In every suit to enforce this liability he is a party, and a personal judgment is rendered against him, corresponding in amount to the judgment of condemnation of the separate estate. Ravisies v. Stoddart, 32 Ala. 599. The object of the statute is not his relief, but it is to secure a suitable maintenance to the family.

Involved in the duty of maintaining the wife while living, is the duty of burying her on her death. Schouler's Dom. Rel. 166. Though the wife dies while living separate from her husband, he is bound to pay her reasonable funeral expenses, and if he does not make the provision, a person voluntarily paying them, is entitled to recover of him the amount so expended. Ambrose v. Kerrison, 4 Eng. Law & Eq. 361. The husband may remove from the grave of the wife, a stone there erected by her parents, without his consent. The right of removal rests on "the indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place." Durell v. Haywood, 9 Gray (Mass.) 248, 69 Am. Dec. 284. In Bertie v. Lord Chesterfield, 9 Mod. 31, the estate of the husband in possession of his devisees, was charged with the payment of the testator's wife's funeral expenses. The husband had requested the plaintiff to see the wife buried. The judgment was not, however, rested on that fact, but solely on the ground that the husband's estate is subject by law to pay the funeral expenses of the wife. A different decision seems to have been made in Gregory v. Lockyer, 6 Madd. Ch. 90, but the ground of decision does not appear. The court may have been enforcing a charge on the estate created by will, or imposed in some other manner. If it proceeds on the ground of a general liability of the wife's separate estate, to the payment of funeral expenses, or of necessaries supplied her while living, it is in conflict with our own case of Gunn v. Samuels, supra. It is also in conflict with the principle on which a court of equity proceeds in charging the wife's separate estate. The principle is, that the wife by her own contract or appointment, has created the charge. As to separate estates recognized in a court of equity, she is regarded as a feme sole, having full power of disposition, if it is not restrained by the instrument creating it. Her act only can charge it. As she cannot by law enter into contract, and fix on herself a personal liability, her own engagements must be void, or chargeable on her separate estate. Her own act, her own promises, express or implied, create the charge, and if these are wanting the separate estate is not liable. Collins v. Rudolph, 19 Ala. 616. It was never allowed the husband to charge the wife's separate estate with the maintenance of the wife during coverture. "Such an allowance," says Chancellor Kent, "would be a fraud upon the marriage settlement by which it was expressly declared, that the husband was not to have any right or interest, in law or equity, to any part of her estate." "The estate was not to be subject to his control or engagements; and, to render it chargeable with the maintenance of her or his family, would be in violation of the settlement." M. E. Church v. Jacques, 1 Johns. Ch. (N. Y.) 450. If it is charged with the payment of the wife's funeral expenses to that extent it is charged with a debt for which the husband is legally liable, and he acquires an interest in the estate, when it is indispensable to its existence that all liability for his debts, and all right or interest of his, shall be excluded. Johnson v. Johnson, 32 Ala. 637; Lamb v. Wragg, 8 Port. 73. The statute creating the separate estates of married women, excludes all marital right of the husband, as known to the common law, and declares such estate "is not subject to the payment of the debts of the husband." Rev. Codes, § 2371. The husband has not an equity to charge this statutory estate, as he had not to charge the separate estate created by deed, will, or other instrument, with necessaries furnished to the wife or to her family. Rogers v. Boyd, 33 Ala. 175. When, therefore, the appellant paid the funeral expenses of his wife, he paid his own debt only, and is not entitled to introduce it as a credit in his settlement of administration of the wife's estate.[19] Whether, if it appeared that the husband had not ability to bury the wife in a manner corresponding with her fortune, he should not be allowed to claim of her separate estate funeral expenses on the same ground that a parent may charge his child's estate with maintenance, is not a question presented by this record, and must not be regarded as affected by this decision.

[Balance of opinion omitted. For errors in other respects the case was reversed and remanded.]

CONSTANTINIDES v. WALSH.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311.)

Contract, upon an account annexed, for the expenses of the funeral of the defendant's testatrix. Writ dated June 18, 1886. Trial in the Superior Court, before Blodgett, J., who allowed a bill of exceptions in substance as follows:

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[19] Accord: Staple's Appeal, 52 Conn. 425 (1884); Gallaway v. McPherson's Estate, 67 Mich. 546, 35 N. W. 114, 11 Am. St. Rep. 596 (1887); In re Weringer, 100 Cal. 345, 34 Pac. 825 (1893); Waesch's Estate, 166 Pa. 204, 30 Atl. 1124 (1895); Long v. Beard, 48 S. W. 158, 20 Ky. Law Rep. 1036 (1898). Contra: Towery v. McGaw, 56 S. W. 727, 982, 22 Ky. Law Rep. 155 (1900).

The funeral expenses of the wife may be charged directly to the husband by one furnishing the funeral. Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168 (1879); Ambrose v. Kerrison, 10 C. B. 776 (1851). But they may also be charged directly to the separate estate of the deceased wife. McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814 (1886); Buffington v. Clarke, 15 R. I. 437, 8 Atl. 247 (1887); Schneider v. Breier's Estate, 129 Wis. 446, 109 N. W. 99, 6 L. R. A. (N. S.) 917 (1906); In re Gibbons, 31 Ont. 252 (1899); Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. Law Rep. 231 (1898). In Gould v. Moulahan, 53 N. J. Eq. 341, 33 Atl. 483 (1895), it was only necessary to decide that where the husband was insolvent the funeral expenses of the wife may be collected from her separate estate.

Louisa Constantinides, the plaintiff's wife and the defendant's testatrix, died on October 23, 1884, possessed of separate estate, all of which she gave to her son, the step-son of the plaintiff, by her will admitted to probate on November 17, 1884. The plaintiff had no knowledge of the will until three weeks after her death, before which time he had contracted, and on October 27, 1884, had paid a bill for her necessary funeral expenses, which it was agreed, was reasonable. It was not contended that the defendant had, prior to or after his appointment, made any promise of payment.

The defendant asked the judge to rule that the plaintiff could not recover, and the judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

HOLMES, J. The funeral expenses of the testatrix were a preferred charge upon her estate. Pub. St. c. 135, § 3; Id. c. 137, § 1; St. 1882, c. 141. Under these statutes, and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessaries, irrespective of any fault on his part. If then it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases where a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death.

If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling. Sweeney v. Muldoon, 139 Mass. 304, 306, 31 N. E. 720, 52 Am. Rep. 708. And formerly, in the case of a married woman, he could have recovered against her husband. Lakin v. Ames, 10 Cush. 198, 221; Weld v. Walker, 130 Mass. 422, 423, 39 Am. Rep. 465; Bradshaw v. Beard, 12 C. B. (N. S.) 344. Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter, it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect.

Exceptions sustained.[20]

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[20] See, also, In re Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101 (1905), wife's will charged her separate estate with funeral expenses.

HYMAN v. HARDING.

(Supreme Court of Illinois, 1896. 162 Ill. 357, 44 N. E. 754.)

CARTWRIGHT, J. In November, 1888, Adelaide Harding, wife of defendant in error, purchased a ring of plaintiffs in error, and suit was brought against both husband and wife for the purchase money. Plaintiffs' declaration consisted of the common counts in assumpsit, and a special count under the statute making both husband and wife chargeable with family expenses. On the trial the common counts were withdrawn from the consideration of the jury. On the claim under the statute the verdict of the jury was against both defendants, and judgment was entered accordingly. Defendant in error alone appealed, and the judgment was reversed, without remanding, by the Appellate Court, which found as a matter of fact, and entered in its judgment, that the purchase price of the ring was $575, that it was a ruby and diamond ring, and that it was purchased without authority from her husband. A certificate of importance having been granted, the cause was brought to this court.

On the trial Adelaide Harding, co-defendant with her husband, was permitted to testify, against his objection, and she testified that the diamond setting was lost from her wedding ring, which originally cost $65, and that she had the ring re-set with diamonds and a ruby costing $575, and it is insisted that the preservation of the wedding ring is a different class of expense from the purchase of an ordinary ring. But this testimony was incompetent, and erroneously admitted. The court said that it was admitted only to bind her, but the action was a joint one, against the husband and wife, and there could be no verdict against one without the other. Whatever would tend to establish the claim and conduce to a verdict against her would affect him in like manner. There was no competent evidence that any part of the ring sued for had ever been a part of a wedding ring, and it must be treated as any other ring—for mere personal gratification and adornment.

Section 15 of chapter 68 of Hurd's Statutes is as follows: "The expenses of the family and of the education of the children shall be chargeable upon the property of both the husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Under the findings of fact by the Appellate Court, the inquiry in this court is whether a ring is a family expense. The statute has been construed in Iowa, from which State it was taken, and elsewhere, to embrace merely legitimate expenses of the family, as such, incurred for articles to be used in the family, and actually used or kept for use therein. Fitzgerald v. McCarty, 55 Iowa, 705, 8 N. W. 646. The term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family. But it does include expenses for many articles used by individual members of the family, if they mutually affect the members generally. It is apparent that even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces in any substantial manner to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise, to the general well-being of all the members. It is equally apparent that an article is not a family expense if it in no way conduces to the welfare of the family generally, even though at times it is used or displayed, by the one for whom it was purchased, in the family. We think that a ring falls within this class. It is for personal adornment, largely to gratify vanity, and, though it may be incidentally worn in the family, its primary and important use is for display in general society.

The case of Marquardt v. Flaugher, 60 Iowa, 148, 14 N. W. 214, is cited by plaintiffs in error; but in that case, which involved a watch and chain, a ring, and some other jewelry, neither the lower court nor the Supreme Court held that the ring was a family expense. The judgment in the lower court was of such an amount that it is a warrantable inference that it did not include the ring, while the Supreme Court impliedly, if not directly, stated that the ring was not a family expense. As to the watch and chain, it may be said that a watch is, primarily at least, for use, and in the family as much as elsewhere. It is usually beneficial to the family, as such, though worn only by one, while a chain may be, in prudence, a proper adjunct to a watch.

It is insisted the cause should have been remanded by the Appellate Court, to enable plaintiffs to try the cause on the common counts; but as the common counts were withdrawn on the trial, the only question related to the liability for expenses of the family and this, we think, the Appellate Court properly determined, and its judgment will be affirmed.

Judgment affirmed.

NEASHAM v. McNAIR.

(Supreme Court of Iowa, 1897. 103 Iowa, 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202.)

The petition alleges that the defendants are husband and wife, a family of large fortune, high social rank, and luxurious habits; that O. E. McNair purchased an article of jewelry for his personal use and adornment, and used the same for such purpose; that he afterward executed a note therefor, no part of which has been paid. It was admitted that the article referred to is a diamond shirt stud. Anna I. McNair demurred on the ground that such stud is not an expense for the payment of which she is liable. The plaintiff elected to stand on the ruling by which the demurrer was sustained, and appeals from the judgment dismissing the petition. Reversed.

Ladd, J. Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense of the family, for which the wife may be liable? Section 2214 of the Code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law the husband was liable for any expense incurred in the clothing and maintenance of the wife and children suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. The wife, however, was not chargeable for necessaries, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessaries, and affords an adequate remedy against both husband and wife. Smedley v. Felt, 41 Iowa, 588; Schrader v. Hoover, 80 Iowa, 243, 45 N. W. 734; Blachley v. Laba, 63 Iowa, 22, 18 N. W. 658, 50 Am. Rep. 724; Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515. The expense, however, is limited to that of the family, and must have been incurred for something used therein, or kept for use of or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646; Smedley v. Felt, supra. In the latter case a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home, under one head or manager. Menefee v. Chesley, 98 Iowa, 55, 66 N. W. 1039, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense. Clothing seems to have been treated as such. Finn v. Rose, 12 Iowa, 565; Devendorf v. Emerson, supra; Smedley v. Felt, supra. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table. Indeed, the services of a physician to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only. Schrader v. Hoover, supra; Marquardt v. Flaugher, 60 Iowa, 148, 14 N. W. 214. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. Brown v. Edmonds, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762; Stewart v. McClung, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374; Bumpus v. Maynard, 38 Barb. (N. Y.) 626. Contra, see Smith v. Rogers, 16 Ga. 480; Rothschild v. Boelter, 18 Minn. 361 (Gil. 331); Gooch v. Gooch, 33 Me. 535; Sawyer v. Sawyer, 28 Vt. 252. See 29 Am. & Eng. Enc. Law, 38. In Sawyer v. Sawyer, supra, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the Supreme Court of New Hampshire, adjudged a breastpin "not to be wearing apparel necessary for the debtor and his family." Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the person from exposure, and not articles of ornament merely. Originally it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person, there appears no good reason for not adjudging it a part of the wearing apparel; else much that is pleasing in dress must be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were often adjuged necessaries for which the husband was liable at common law. Raynes v. Bennett, 114 Mass. 424; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27. These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk hat. The article may be unnecessary, or such as the family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided. Dodd v. St. John, 22 Or. 250, 29 Pac. 618, 15 L. R. A. 717. If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank, and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no inconsiderable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actually used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor. Reversed.

ROBINSON, J. (dissenting). I do not agree to what is said in support of the conclusion of the majority.

STRAIGHT v. McKAY.

(Court of Appeals of Colorado, 1900. 15 Colo. App. 60, 60 Pac. 1106.)

THOMSON, J. This suit was begun before a justice of the peace, and went to the county court by appeal. That court gave its judgment to the defendant, and the plaintiff has brought the judgment here for review. There were no written pleadings, and the nature and limits of the plaintiff's claim must be sought in the evidence.

On the 15th day of March, 1897, the plaintiff and J. H. McKay entered into a written contract, whereby the former leased to the latter a dwelling house and the household furniture which it contained, for the term of one year from the 1st day of April, 1897, at a monthly rental of $70.00; the lessee agreeing also to pay all assessments for water rent levied during the term of lease, as well as all charges for heating and lighting the premises, and, at the end of the term, to return the property in as good order and condition as it was in when he received it. The rent for April and May was paid. On the last day of May, the lessee and his family vacated the premises, and there was no further payment of rent. The plaintiff was unable to procure another tenant until the first day of the following September, when he leased the property for $60.00 per month. McKay did not pay the water rent, or the charges for lighting the premises, and the plaintiff paid a water bill of $18.00, and assumed a light bill of $8.65. During the occupancy of the premises under the lease, the furniture, carpets, and furnace were damaged to the amount of $90.00. The foregoing was all the evidence. This suit was brought against Beulah McKay, the wife of the lessee. Recovery was sought for $90.00, the damage to the furniture, etc., and $210, the rent for June, July and August, the months during which the premises were idle. In court, the plaintiff's claim, as stated by his agent, was specifically confined to those items, so that the water and light bills, and the reduction in rent to which the plaintiff was compelled to submit, when the premises were finally let, are not in the case.

It will be seen that the purpose of the action is the recovery of damages for breach of the contract of lease. The plaintiff bases his right to pursue the wife for those damages upon the following statutory provision: "The expenses of the family and the education of the children, are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." Session Laws 1891, pp. 238, 239 (3 Mills' Ann. St. § 3021a). If we correctly understand the position of the plaintiff, it is that the defendant is bound by all the covenants and conditions of the contract of the lease, and that her liability for a breach of those covenants and conditions is coextensive with that of her husband. She was not a party to that contract; the covenants and agreements it contained were not hers, so that her liability, whatever it may be, is not a contract liability. A right of action is given against her for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other. Food and clothing are family expenses, and so are luxuries purchased for the use of the family. Such expenses are not confined to necessaries, but to be family expenses they must be for things received by the family, or some member of the family. The family requires a house in which to live, and the rent of the house occupied by it is part of the cost of living and is a family expense. But the rent of a house which the family does not occupy is not a family expense. So long as the defendant and her husband lived in the plaintiff's house, the rent agreed to be paid was a portion of the family expense, but when they left it, and went elsewhere, the rent chargeable against the husband by virtue of his contract, was not a family expense, because the family no longer had the benefit of the house. Damage done to furniture, which might be the subject of an action in tort, or which might be recovered against the husband by virtue of his contract, cannot be classed as a family expense. The husband is bound by the terms of the contract into which he entered, and he will be held to its performance, but the liability of the defendant is of statutory creation, and, as the statute is in derogation of the common law, she cannot be held beyond its letter. An indebtedness for something of which the family, or some one or more of its members, has had the actual benefit, she can be compelled to pay. It was incurred for family expenses. But an indebtedness for something of which neither the family, nor any of its members, has had the enjoyment, she cannot be compelled to pay, unless she contracted the debt herself. The statute does not cover such a debt.

A number of other states have statutes identical, or nearly identical, in terms, with ours, and those statutes have been the subject of considerable adjudication in those states. We have been referred to a voluminous list of decisions disposing of a great variety of questions arising under those statutes. To review each of those decisions would swell this opinion to undue dimensions. It is enough to say that we have found nothing in disharmony with the views we have expressed, or that would authorize a recovery against the defendant upon the facts of which we are in possession.

The judgment will be affirmed.

Affirmed.[21]

BISSELL, P. J., not sitting.

GILMAN v. MATTHEWS.

(Court of Appeals of Colorado, 1904. 20 Colo. App. 170, 77 Pac. 366.

MAXWELL, J.[22] Action against husband and wife for the price and value of wearing apparel—one dress suit, one tuxedo, and one sack business suit—sold and delivered to the husband at his special instance and request. From a personal judgment against both defendants, the wife appeals.

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[21] The spouse not joined in the lease is liable under the statute for rent accruing while the family is in possession. Houghteling v. Walker (C. C.) 100 Fed. 253 (1900); Illingworth v. Burley, 33 Ill. App. 394 (1889); Barnett v. Marks, 71 Ill. App. 673 (1894).

[22] Statement abridged from opinion and other parts of opinion omitted.

This action is founded upon 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto, they may be sued jointly or separately." A reversal of the judgment is urged upon the grounds: * * * (3) Because it was not shown that the husband and wife were living together so as to constitute a family. * * *

This brings us to a consideration of the third proposition advanced by defendant. The complaint alleged that the clothing was used as a part of the "family expenses" of the defendants, who were husband and wife. The answer admitted that defendants were husband and wife, but denied that the clothing was used as part of the family expenses, and averred that it was used by the husband alone. There is no testimony whatever upon this point; nothing to show that any family relation existed between the defendants; nothing to show that there was any family, or that defendants were living together. A family is defined to be a collective body of persons who live in one house and under one management. Webster's Dictionary. The admission that defendants were husband and wife is not an admission that they constituted a family, nor, in this day and generation, can any presumption be based upon such admission. All the authorities hold that "expenses" for which the wife is personally liable under the statute must be "family expenses." The language is too plain to admit of any question. Schlesinger v. Keifer, 30 Ill. App. 253, was an appeal from a judgment against plaintiffs in an action against husband and wife for apparel furnished the wife. The court said: "This was an action under section 15, c. 68, Rev. St. 1874, by appellants against appellees as husband and wife, charging them with ladies' and children's apparel, sold by appellants to her as family expenses. In this action against them jointly no other ground of recovery can be relied upon. It would seem to be a condition precedent to any family expenses that there should be a family; a family in fact, without regard to what knowledge the persons selling the goods had of the fact. If they sold, as they supposed, to a bachelor or a spinster, and it then turned out that there was a wife or a husband, who with the purchaser, constituted a family, probably both could be held, and vice versa. In this case, it appeared that the appellees had ceased to live together for some months before the purchase, though the appellants had no notice of such separation. Neither had the husband any notice that the wife was buying goods. The superior court rightly decided that appellees were not liable under the statute for family expenses, where there was no family." In Hudson v. King, 23 Ill. App. 120, cited by appellees, it seems to have been regarded essential to the liability of the wife that she and her husband constitute a family in fact. While this particular question was not involved in Kelly v. Canon [6 Colo. App. 465, 41 Pac. 833] supra, this court said: "A wife, under the statute, could only be held for the original consideration on proof that the goods were furnished for the family." And in Straight v. McKay [15 Colo. App. 60, 60 Pac. 1106] supra. "The right of action is given against her for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other."

For failure of proof that there was a family, and that the indebtedness which was the subject-matter of the action was on account of family expenses, the judgment will be reversed. Reversed.[23]

HAGGARD v. HOLMES.

(Supreme Court of Iowa, 1894. 90 Iowa, 308, 57 N. W. 871.)

Action to recover the amount due on certain promissory notes given by defendant W. G. Holmes. His wife and codefendant Hannah Holmes, filed a demurrer to the petition, which was overruled, and then filed an answer, which contained two divisions. A demurrer of the plaintiff to the second division was overruled. He elected to stand on his demurrer and judgment was rendered in favor of Hannah Holmes for costs. The plaintiff appeals. Affirmed.

Robinson, J. The petition alleges that the defendant W. G. Holmes purchased an atlas or history of Muscatine county, Iowa, with pictures of himself and his wife inserted therein, and that he gave the notes in suit in settlement of the indebtedness incurred by his purchase; that the book was purchased for the benefit of the family of the defendants, and was used and kept for use by the family. In the second division of her answer, Mrs. Holmes alleges that, when the vendor of the book sought to sell it to her husband, she protested to the vendor against the purchase, and notified him that she did not want the atlas, and would not purchase or pay for it; that the vendor induced her husband to take the book, and give his notes for it, against her protest, well knowing that she had refused to sanction or consent to the purchase, with intent to cheat and defraud her, and to compel her to pay for the book from her separate property, under the pretense that the purchase was a family expense. The theory of the plaintiff's demurrer is that the husband, as the head of the family, had the right to incur a family expense, and thereby charge the separate property of the wife, although she objected to the purchase, and refused to consent to it. The pleadings do not show that the book was a family necessity. Something is claimed by the appellant from the ruling of the district court on Mrs. Holmes' demurrer to his petition, but the most that can be said for it is, that it held that the book was an item of family expense, because purchased for, and kept and used by, the family. It was not held, and the pleadings do not show, that it was a family necessity. We are, therefore, required to determine whether the husband may bind the property of the wife against her will, and notwithstanding her protest, in purchasing an article which is used by their family, and is properly classed as for the use and benefit of the family, but is not necessary for it. Section 2214 of the Code is as follows: "2214. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." That section was construed in Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515, where it was held that family supplies sold to the wife, when the sale had been forbidden by the husband, there being no evidence that there was a necessity for the purchase, were not chargeable upon the property of the husband. Some prominence was given to the fact that, as a general rule, the husband is the one upon whom the family depends for support, and that he was supporting the family in that case, and had the right to decide of whom he would purchase the family supplies; but the decision did not wholly rest upon that fact. We think that the doctrine of that case is applicable to this, and that the husband cannot fix a liability, as against the wife, by purchasing articles for the family which are not needed by it, when she has, in effect, forbidden the purchase, refusing to be bound by it, and has duly notified the vendor of that fact.

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[23] Accord: Hudson v. Sholem, 65 Ill. App. 61 (1896); Featherstone v. Chapin, 93 Ill. App. 223 (1900). But note Hoobler v. Heenan, 81 Ill. App. 422 (1898).

We conclude that the demurrer of plaintiff was properly overruled, and the judgment of the district court is affirmed.[24]

LEWIS v. LYNCH.

(Appellate Court of Illinois, Second District, 1895. 61 Ill. App. 476.)

Mr. Justice Lacey delivered the opinion of the court.

This action was brought by appellee, administrator of the estate of Andrew J. Lynch, deceased, in the County Court, February 14, 1895, to recover on an account for certain merchandise claimed to have been sold and delivered to Edward C. Lewis, commencing June, 1884, and closing March, 1886. The goods were charged to the husband of the appellant, Edward C. Lewis. The total amount of the claim agreed upon was $207.07.

The right to recover, as declared in the declaration, was that Nellie Lewis and Edward C. Lewis were husband and wife, and the goods were bought and used, and became and were "a family expense" and by virtue of the statute, the appellant was liable to pay for them. Also, in the third count of the declaration, as well as the fourth, appellant was charged with the purchase of the goods, and it was averred that they were used in the family of the defendant and her husband. The pleas, so far as we need notice them, were, first, the general issue; second, plea of the statute of limitations, alleging that the cause of action did not accrue within five years next before the commencement of the suit. Appellee replied to the second plea, that the action did accrue within five years. And after the testimony was heard by the court, and the case taken under advisement (a jury having been waived), appellee obtained leave to file an additional replication to the second plea of the appellant, setting up that Edward C. Lewis, being still the husband of the defendant and the head of the family, residing with the same, and being still indebted to Andrew J. Lynch, for said expenses of said family, as in the declaration named, on December 11, 1886, executed to Andrew J. Lynch, his certain promissory note for $220.23, due in six months, with interest at eight per cent. annum, said sum of money being then and there due and owing by E. C. Lewis and defendant for expenses of the family of defendant and E. C. Lewis.

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[24] See, also, Hibler v. Thomas, 99 Ill. App. 355 (1901).

To this replication appellant interposes a demurrer which was overruled by the court, and appellant abided by the demurrer. Appellant also excepted to the order of the court permitting this additional replication to be filed after the cause was heard and taken under advisement.

Judgment was rendered against appellant for $292.87, and cost of suit, $85.80 of which was interest on the account or note.

We think the objection that the court had no power to allow the replication to be filed at the time it did, is not tenable under our statute. Under section 24, chapter 110, of the Practice Act, amendments of this kind may be made at any time before final judgment. Another point appellant makes is, that the evidence failed to sufficiently show that the goods were used in the family of the appellant and E. C. Lewis.

On this point we find that the evidence tended strongly to show that they were delivered to the family and used as a family expense, and we would not be justified in reversing the judgment for want of sufficient evidence to sustain it on that point.

The main point in contention is over the question as to whether the court erred in overruling appellant's demurrer to appellee's additional replication to the second plea.

In deciding this question we find the point of law raised for the first time in this State, so far as we know, whether the husband or the wife can, either, without the consent of the other, revive a debt barred by the statute of limitations, by signing and executing a note in his or her own name, for an account for family expenses. Otherwise it is an exception to the general rule of the law, long established in this State, that a joint debtor can not arrest the running of the statute of limitations as against his co-debtor without his consent, or revive an action barred by the statute, by making payment on the debt or by promising to pay, it, or by giving a new note. In the case of Kallenbach, Jr., v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47, it was held by the Supreme Court that one joint debtor could not, by his own agreement, expressed or implied, extend the time of the running of the statute, or revive a note already barred, by his own agreement, without the consent of his co-debtor. This has been understood to be the law in this State ever since. In a well reasoned opinion in that case, the case of Whitcomb v. Whitting, Doug. 652, was considered, but rejected as authority in this State. The rule laid down in that case has never been departed from, but always held to be the law. In some States the rule has been held to be different—that a co-debtor has an implied agency to renew the statute of limitations and arrest its running by payments and agreements until the debt is paid.

This doctrine appears to be based upon the assumption that in case of joint liability each party has an implied authority to pay it, and even by reason of his position as joint debtor, by agreement to arrest the statute of limitations without the others consenting. This in the Kallenbach and Dickinson case, supra, was thought to be a very unjust and harsh rule and opposed to sound reason. As to their standing in regard to pecuniary matters in the State of Illinois, and their dealing with their separate property rights, husband and wife have, as near as possible, been made by the statute as independent of each other as strangers, and the wife is given nearly all the rights of a feme sole; and the husband's rights were always independent. They may sue and be sued separately, and section 5, chapter 68, provides: "Neither husband nor wife shall be liable for the debts or liabilities of the other incurred before marriage, and (except as herein otherwise provided) they shall not be liable for the separate debts of each other, nor shall the wages, earning or property of either, nor the rent or income of such property be liable for the separate debts of the other."

By the 6th section, she has every right to contract and deal the same as if she were unmarried, except entering into and carrying on a partnership without the consent of her husband; she can convey her own real estate, and even have a remedy against her husband for invading her property rights. Very few exceptions are made to a wife's complete emancipation as to her property rights. There seems to be one exception. Section 15 of the same act provides: "The expenses of the family and the education of the children shall be charged upon the property of both husband and wife, in favor of the creditors therefor; in relation thereto they may be sued jointly or separately." By this section either the husband or wife may be rendered jointly liable for a debt contracted by either for family expenses without the consent of the other. The question arises now whether, after the debt is contracted and established, either can arrest the statute of limitations as to the other by giving their own note for the debt.

We are of the opinion that in the original contracting of the debt either party may buy on time and give his or her note for goods used and to be used for family expenses, and that would bind the other party, because the goods are obtained by means of the contract and the statute gives either party the right to purchase the goods to be used in the family and bind the other if they are so used. This was decided in Houck v. Smith's Sons, 46 Ill. App. 66; but the court in that case refused to pass on the question as to the right to give a note in renewal and thereby extend the statute of limitations as to the other.

We are of the opinion that the question here involved is one more particularly concerning the statute of limitations than a construction of the act in relation to husband and wife—section 15 above quoted. We think that, under the laws of this State, a debt like the one in question could not be revived after the running of the statute of limitations by either party, without the consent of the other. Such an authority would have to be implied as necessarily resulting from the language of the statute. We do not think it does so necessarily result, as it is not necessary for the protection of the creditor in furnishing supplies for the family. All that he is concerned in is to know that the husband or wife ceases to make any contract concerning the debt to bind the other. It is like any other joint liability of a joint debtor.

It is true that this statute was copied from the statute of Iowa, and that the Supreme Court of that State, previous to the adoption of the statute by the State of Illinois, held that the husband could renew or extend the debt barred by the statute of limitations and bind the wife by his separate contract, and extend it as to her without her consent. See Lawrence v. Sinnamon, 24 Iowa, 80; Smedley v. Phelps, 41 Iowa, 588; Jones v. Glass, 48 Iowa, 345; Frost v. Parker et al., 65 Iowa, 178, 21 N. W. 507; Waggoner v. Turner, 69 Iowa, 127, 28 N. W. 568.

We know not, and upon examination of the Iowa reports can not find, whether the rule adopted in Kallenbach v. Dickinson, supra, prohibiting one joint debtor against his co-debtor without consent, prevails in Iowa. If it does not, and a contrary rule holds there, the opinion in those cases above cited would be in perfect harmony with the general doctrine of the statute of limitations. The construction of a statute by the courts of one State, adopted in another, will generally be accepted in the State adopting it, except where it is opposed to the spirit of the general laws of the latter State. Cole v. People, 84 Ill. 216; McCutchen v. People, 69 Ill. 601; Streeter v. People, 69 Ill. 595.

In the case at bar, we regard the question on the demurrer to be one of the statute of limitations, rather than a construction of the act in question, although it may arise out of it. The debt was created under the statute, and each party as to it was jointly liable. In that particular we can see no distinction between such joint liability and any other. The husband and wife, as appears from the statute quoted, are in no sense partners as to their property rights, nor are they jointly or severally liable for each other's debts or obligations, except in the one instance—for family supplies and education of the children—and such liabilities are in no sense those of a partnership. They are only such as are created by statute and that alone. The statute alone contemplates the establishment of a class of claims against the husband and wife severally and jointly, and the manner in which they may be sued, and has no reference to limitation. When the note is once created it must be paid by each and both the same as other joint liabilities. It is not doubted that the statute of limitations would run against such a debt. If so, the general spirit and policy of the laws of this State, long prevailing, are that one joint contractor or obligor may not extend or void the statute of limitations by contract, expressed or implied, as to the other, without his consent. There has been no exception to this obviously just rule so far established.

But for the Iowa decisions there could be but little question that the general rule under the statute of limitations would apply in this State. It is a question of limitation rather than a construction of liability under the statute in question. As the Iowa decisions appear to be contrary to the spirit of our laws, in regard to limitations long established, we do not think that the rule announced in them touching that question ought to be adopted there, or that any rule of law requires it. From what we have said it will be seen that we hold that the court erred in overruling the demurrer to the additional replication to the second plea.

The judgment of the court below is therefore reversed and the cause remanded.

BOSS v. JORDAN.

(Supreme Court of Iowa, 1902. 118 Iowa, 204, 89 N. W. 1070.)

Action in equity to subject certain property of Laura A. Jordan to the satisfaction of a judgment against her husband. Decree for plaintiff. Defendants appeal.

McCLAIN, J.[25] Plaintiff's intestate recovered judgment against Henry Jordan on a promissory note executed to one Janns for alleged medical services, and brought this action to subject the property in question to the payment of that judgment, claiming that the medical services for which the note was given were a family expense for which Laura A. Jordan, as wife of the judgment defendant, was liable, under the language of Code, § 3165, which provides that "the expenses of the family * * * are chargeable upon the property of both husband and wife, or either of them." It is contended on behalf of appellant that the property of the wife cannot be subjected to a judgment against the husband for family expenses until a judgment has been rendered against her in a proceeding to which she is a party, and that, as no such judgment has ever been rendered in this case, Laura A. Jordan has not had her day in court with reference to the validity of plaintiff's claim, and has had no opportunity to show that the note was without consideration. It seems, however, to be well settled that the wife cannot inquire into the validity of an indebtedness created by the husband for family expenses, and that when an expense has been incurred by him for that purpose, for which he is liable, her property thereby becomes bound for its payment. Lawrence v. Sinnamon, 24 Iowa, 80; Smedley v. Felt, 41 Iowa, 588; Frost v. Parker, 65 Iowa, 178, 21 N. W. 507. It is not necessary to go so far in this case, for the wife was allowed to plead that the note on which the judgment was rendered was without consideration, and to introduce evidence to that effect if she could, but this defense was not established. That a creditor who has obtained a judgment against the husband for family expenses may in an equitable action subject the property of the wife to the payment thereof, without first recovering a judgment at law against the wife, is settled by Frost v. Parker, supra. * * *

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[25] Statement abridged and part of opinion omitted.

Affirmed.[26]

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[26] Under a somewhat different statute in force in Nebraska, it was held that judgment must first be obtained against the wife before her land could be reached for the payment of a judgment against the husband for family expenses. George v. Edney, 36 Neb. 604, 54 N. W. 986 (1893).

CHAPTER VI

CONTRACTS OF MARRIED WOMEN

SECTION 1.—AT COMMON LAW

[At common law the attempted contracts of a married woman were void in the most extreme sense, viz., they were unenforceable against the married woman. Lee v. Lanahan, 59 Me. 479 (1871); Sheppard v. Kindle, 3 Humph. (Tenn.) 80 (1842). The married woman's heirs were not liable on her bond. Foster v. Wilcox, 10 R. I. 443, 14 Am. Rep. 698 (1873). The promise of a married woman was not even effective to waive the running of the statute of limitations in her favor against a debt contracted by her when a feme sole. Farrar v. Bessey, 24 Vt. 89 (1852). The attempted contract of a married woman could not be affirmed by her after her coverture had ceased. Lloyd v. Lee, 1 Strange, 94 (1718); Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597 (1900); Ruppel v. Kissel, 74 S. W. 220 (1903); Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 29 Ky. Law Rep. 1248, 7 L. R. A. (N. S.) 1053 (1906). The incapacity of the married woman to contract has been held not to be relaxed where the husband had not abjured the United States or been banished, exiled, transported, or relegated therefrom, but had willfully deserted his wife and departed from the United States, leaving his wife wholly destitute of means of support. Robinson v. Reynolds, 1 Aikens (Vt.) 174, 15 Am. Dec. 673 (1826). Contra to the last, however: Prescott v. Fisher, 22 Ill. 390 (1859); Anderson v. Jacobson, 66 Ill. 522 (1873); Gregory v. Pierce, 4 Metc. (Mass.) 478 (1840).]—EDITOR'S NOTE.

SECTION 2.—IN EQUITY

LAW AND PUBLIC OPINION IN ENGLAND, by A. V. Dicey, pp. 379, 380: "Equity never in strictness gave a married woman contractual capacity; it never gave her power to make during coverture a contract which bound herself personally. What it did do was this: It gave her power to make a contract, e. g. incur a debt, on the credit of separate property which belonged to her at the time when the debt was incurred, and it rendered such separate property liable to satisfy the debt. Hence two curious consequences. The contract of a married woman, in the first place, even though intended to bind her separate property, did not in equity bind any property of which she was not possessed at the moment when she made the contract, e. g. incurred a debt. The contract of a married woman, in the second place, if made when she possessed no separate property, in no way bound any separate property, or indeed any property whatever, of which she might subsequently become possessed. W, a married woman, on the

1st January, 1860, borrows £1000. from A on the credit of her separate property, which is worth £500. A week afterwards W acquires, under her father's will, separate property amounting to £10,000. The £500. she has meanwhile spent, the £10,000. is not chargeable with her debt to A. Let us suppose a case of exactly the same circumstances except that when W borrows the £1000. from A she is not possessed of any separate property whatever, but tells A that she expects that her father will leave her a legacy and that she will pay for the loan out of it. She does, as in the former case, acquire a week after the loan is made £10,000. under her father's will, and acquires it as separate property. It is not in equity chargeable with the debt to A."

MURRAY v. BARLEE.

(High Court of Chancery, 1834. 3 Mylne & K. 209.)

By a settlement made on the marriage of Charles William Barlee and Frances Sarah Mitchell, certain freehold estates were conveyed to three trustees and their heirs, to the intent that they should receive yearly during the joint lives of Charles Barlee, and Catherine his wife, and of Frances Sarah Mitchell, and, after the decease of Charles Barlee, or of Catherine his wife, then during the joint lives of those two persons and of Frances Sarah Mitchell, a rent-charge of £100., in trust to pay and apply the same from time to time unto Frances Sarah Mitchell, or permit her to receive the same for her sole use, exclusive of her then intended or any future husband, so that the same might not be under his control, or subject to his disposition, debts, or engagements; and so that the receipts of Frances Sarah Mitchell, or her appointee might, notwithstanding her coverture, be a good discharge for such part of the same as should therein be expressed to be received. Certain other freehold estates were conveyed to the same trustees and their heirs upon the like trusts, for the separate use of Frances Sarah Mitchell during her life. The settlement contained clauses restraining Frances Sarah Mitchell from anticipating, charging, or assigning the growing payments of the rent-charge of £100., or the dividends of a sum of £400. which had been transferred into the names of the trustees, and declared to be for her separate use.

The marriage took place shortly after the date of the settlement.

In the year 1818 Mr. and Mrs. Barlee separated, and from that time continued to live apart.

In April, 1819, Mrs. Barlee, by her next friend, filed a bill against her husband and the trustees of the settlement, praying for an account of the rents and dividends of the property settled to her separate use; and by a decree made at the hearing of that cause on the 11th of March, 1825, it was referred to the Master to take an account of the rents and dividends received by the trustees.

In pursuance of a decree made on further directions on the 23d of July, 1828, two of the trustees were discharged, and a receiver of Mrs. Barlee's separate property was appointed. No new trustees were appointed in the room of the trustees discharged, and the £400. stock was transferred into the name of the Accountant-General, in trust in that cause.

The plaintiffs, Charles Murray and James Archibald Murray, were retained by Mrs. Barlee, and acted as her solicitors in the cause of Barlee v. Barlee from June, 1824, till November, 1828, when she discharged them from being her solicitors; and by different orders made in that cause, they had received payment of the several sums in respect of fees, charges and disbursements due to and incurred by them in the prosecution of that cause.

But during the above-mentioned period, the plaintiffs were also employed by Mrs. Barlee in various other matters besides the suit of Barlee v. Barlee. In August, 1824, they were employed by her in opposing a petition presented by her husband to the Lord Chancellor for the purpose of obtaining a commission of lunacy against her, which petition was eventually dismissed. In the same year they obtained a habeas corpus, by virtue of which Mrs. Barlee, who was at that time confined in Ipswich gaol under the process of an ecclesiastical court, was brought up and discharged. In 1825, they were employed by her in prosecuting certain persons for a conspiracy, and they afterwards defended a suit instituted against her, for the purpose of charging her separate estate with certain debts alleged to have been incurred by her for necessaries while living apart from her husband. Mr. Barlee, the husband, had several years ago become bankrupt, was insolvent, and resided out of the jurisdiction of the Court. During the time the Plaintiffs acted as the solicitors of Mrs. Barlee, various letters were written to them by Mrs. Barlee, in which she instructed them to act as her solicitors; and in some of such letters she adverted to her husband's bankruptcy or insolvency, and the fact of his having left England to avoid his creditors, and she promised or gave the Plaintiffs to understand that she would pay the costs and charges to become due to them for business done by them for her; but she did not refer to her separate property, or expressly promise to pay such costs and charges out of it. The bill of fees, charges, and disbursements, other than the costs paid to the Plaintiffs in the suit of Barlee v. Barlee, amounted to upwards of £700., and was signed and delivered by the Plaintiffs to Mrs. Barlee.

The bill, filed by the Plaintiffs against Charles William Barlee, and Frances Sarah his wife, and the continuing trustee of their marriage settlement, stated the above mentioned facts, and prayed a declaration that the amount due to the Plaintiffs for their fees, charges, and disbursements ought to be paid to them out of the income of Mrs. Barlee's separate property; and that a sufficient part of the monies paid into the Bank by the receiver in the cause of Barlee v. Barlee, and of the monies to be thereafter received on account of Mrs. Barlee's separate property, might be applied in payment of what was due to the Plaintiffs, and that, in the meantime, Mrs. Barlee might be restrained from receiving any part of the proceeds of such separate property.

To that bill Mrs. Barlee put in a general demurrer, which was overruled by the Vice-Chancellor. The argument and judgment upon the demurrer are reported in the fourth volume of Mr. Simons' Reports, p. 82.

The cause was afterwards heard before the Vice-Chancellor, on the 17th of November, 1831, when his Honor decreed that the bill of costs should be taxed; that the Plaintiffs should give credit for the monies which they had received from Mrs. Barlee, and that the balance should be paid to them out of those particulars of her separate property as to which she was not restrained from anticipation.

From this decision Mrs. Barlee presented a petition of appeal to the Lord Chancellor.

The Lord Chancellor [Lord Brougham], after stating the case, proceeded as follows:

It is said that this case raises, for the first time, the question whether or not a feme covert can bind her separate estate, and, in respect of it, be sued as a feme sole for law expenses incurred by her, that is, for her attorney's or solicitor's bill of costs, upon her retainer and promise to pay merely, and without any more formal instrument or obligation. For I do not understand it to be denied, and, if it were, all authority would be decisive in removing even a doubt upon this, that had a bond been given to the solicitor, the separate estate would have been liable, and the wife suable upon that instrument, just as much if the consideration were a bill of costs at law or in equity, as if the instrument had had its origin in any other consideration. But it is said that here the retainer and the promise thereby implied to pay the costs incurred, or the promise proved by the correspondence, are insufficient to charge the separate estate and render the wife liable to a suit.

That at law a feme covert cannot in any way be sued, even for necessaries, is certain. Bind herself, or her husband, by specialty she cannot; and although, living with him, and not allowed necessaries, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him, yet even in respect of these she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the cestui que trust or the mortgagor, the legal estate, which is the only interest the law recognises, being in others. But though this is now settled law, we know that it was not always so; or at least that an exception was admitted to what all men allowed to be the general rule. When Corbett v. Poelnitz [1 T. R. 5] was decided, Lord Mansfield said that, as times alter, new customs and manners arise, and he held, with the concurrence of all his learned brothers, that where the wife has a separate maintenance, and lives apart from her husband, receiving credit upon the possession of that estate, she ought to be bound; and the action was accordingly held to lie. That this great and accomplished Judge, imported his views on the subject from those courts of equity which he had once adorned as an advocate, I have no doubt; but it is certain that the decision never received the assent of Westminster Hall. That those who pronounced it very strongly adhered to it, there can be no question. Mr. Justice Buller, sitting in this court a few years after, recites it among other clear points, and plainly refers to it more emphatically than to the rest, in these words: "All these things have been determined, and I know no reason why these decisions should not be as religiously and as sacredly observed as any judgment, any time, by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare, and interest of mankind." Compton v. Collinson [2 Bro. C. C. 385]. He adds, that the reasons on which these decisions were founded were so satisfactory both to the parties interested and to the profession, that no writ of error had ever been brought. It happened, however, that this was a very groundless panegyric. The profession was always much divided upon the point, and latterly the general opinion was against it. A case for the opinion of the Court of Common Pleas was directed by Mr. J. Buller in Compton v. Collinson; and though the certificate of the Judges, when that case came to be argued [1 H. Blackst. 334], was in conformity with the law as then laid down by Lord Mansfield, yet Lord Loughborough, in delivering the judgment of the Court, observed, after an elaborate review of the cases, that it could not be considered as a settled point, that an action might be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance. A few years afterwards, that judgment, which had been pronounced to be as worthy of religious and sacred observance as any judgment ever delivered, was overruled, on the fullest consideration, and after two arguments, by the unanimous determination of all the Judges. Marshall v. Rutton [8 T. R. 545]. The doors of the courts of common law were thus shut against an admission of the equitable principle; and the law was fixed, that in those courts the wife could in no way be sued by reason of her having separate property, and living apart from her husband.

But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added, that the current of decision has generally run in favour of such recognition. The principle has been supposed to be carried further in Hulme v. Tenant [1 Bro C. C. 16] than it had ever been before, because there a bond in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could be only reached by implication; and though till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by himself. It is enough to mention Heatley v. Thomas [15 Ves. 596] and Bullpin v. Clarke [17 Ves. 365], both before Sir William Grant, who, in the latter case held the wife's separate estate to be charged by a promissory note for money lent to her; which at law never could have charged the husband in any way, directly or indirectly. The same was held as to a bill of exchange accepted by a feme covert in Stuart v. Lord Kirkwall [3 Mad. 387], and an agreement by the wife as to her separate estate in Master v. Fuller [1 Ves. Jr. 513, and 4 Bro. C. C. 19]. In all these cases I take the foundation of the doctrine to be this: The wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise, is, whether or not she has validly encumbered it. At first the Court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it.

A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be an execution of a power, was always, of course, considered as made in execution of it. But so, if, by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert without any reference to her separate estate, it was held in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle, and it goes the full length of the present case.

But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. This point was discussed in Greatley v. Noble [3 Mad. 79], and the present Master of the Rolls appears in the subsequent case of Stuart v. Lord Kirkwall [Id. 387], to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in Greatley v. Noble, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point.

I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, Kenge v. Delavall [1 Vern. 326], makes no mention of such a distinction, for there being indebted generally, is all that is stated as grounding the claim; and in Lillia v. Airey [1 Ves. Jr. 277] the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60.; the Court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond.

But the present is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie; but there are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them, that is, to pay the costs which shall be taxed. The present case is, in almost the whole, if not the whole of it, covered by such written authority, although such written authority was not necessary to bind Mrs. Barlee's separate estate. I am of opinion, therefore, that the decree of his Honor ordering the solicitor's bill to be taxed is well founded.

Nothing could more effectually defeat the very purpose of such settlements than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppression and circumvention, and to be made independent of her husband as well as of all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor, while she can only obtain such help by executing a mortgage or by granting bonds or notes, she is not on the same footing with them. I hold, therefore, that so far from a solicitor's or attorney's bill being less entitled to favour in courts of equity when sued upon, as against the separate estate of a married woman, the argument is all the other way.

I have no doubt at all on any part of this case, into which I have only gone at large from its alleged novelty, and its importance in principle; and I affirm the decree with costs.[1]

YALE v. DEDERER.

(Court of Appeals of New York, 1860. 22 N. Y. 450, 78 Am. Dec. 216.)

SELDEN, J.[2] * * * To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon the estate, by giving a promissory note for the debt of her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact, that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

Much has been said, in the course of the decisions on this subject, in regard to the intention of the wife at the time of making the contract; and in order properly to appreciate the force of these remarks, a brief retrospect of the law of separate estates is required. I shall not attempt a review of the cases, confused and contradictory as some of them are, but desire to call attention to one or two features of the controversy carried on in the English courts for nearly a century, and which can hardly even now be considered as ended, in regard to the effect of the contracts of married women upon their separate estates. If the instrument by which the estate was created, conferred upon the wife either a general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose, related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates, upon the ground that the right of disposal was a necessary incident of the right of property.

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[1] It has been held that a married woman's contract as surety for her husband's debt binds her separate estate, even though there were no explicit words to show an intent to so charge it. Heatley v. Thomas, 15 Ves. Jr. 596 (1809); Morrell v. Cowan, L. R. 6 Ch. Div. 166 (1877), reversed on another point in 7 Ch. D. 151 (1877); Bell & Terry v. Kellar, 13 B. Mon. (Ky.) 381 (1852); Frank v. Lilienfeld, 33 Grat. (Va.) 377 (1880). See, also, Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480 (1871).

The same rule has been held to prevail under an act giving to the married woman her separate legal estate. Hershizer v. Florence, 39 Ohio St. 516 (1883).

[2] Part of the opinion is omitted.

That this universal jus disponendi was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of Fettiplace v. Gorges, 3 Bro. C. C. 8, places the right upon this ground, and no other basis has ever been suggested for it. Assuming this then to be the foundation of the right, it is plain that the wife, to avail herself of it, must make some disposition of the specific property itself. It is clearly impossible to deduce, from the jus disponendi, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the Master of the Rolls, in Norton v. Turvill, 2 Pr. W. 144, and in Standford v. Marshall, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for the money lent to the husband.

The reasoning upon which these cases are said to have proceeded, and upon which they were followed by Lord Thurlow, was this: That it being the rule in equity, that a wife who had a separate estate might deal with such estate in the same manner as if she were sole. It followed that such estate was liable for her engagements, in the same manner as it would be if she were a feme sole. The equitable rule, which being founded entirely in the right of the wife to dispose of her property, could go no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus expanded, so as to enable her to contract generally without in any manner referring to such estate. The doctrine was justly characterized by Chancellor Kent in the case of the Methodist Episcopal Church v. Jaques, 3 Johns. Ch. 77, where, speaking of the two cases to which I have referred, among others he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment be deemed valid. She is incapable of contracting according to the 'common right,' mentioned by Lord Macclesfield; and if investing her with separate property, gives her the capacity of a feme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a feme sole in any other view, or for any other purpose."

But, although Lord Thurlow followed, as we have said, what he supposed to be the rule established by the cases referred to, he nevertheless saw the fallacy upon which those cases were based, as appears by his remarks in the case of Hulme v. Tenant, 1 Bro. C. C. 16, the leading case on this subject. There the separate estate of a wife was held liable for the payment of her bond given for money borrowed, part of which had been borrowed by her husband, and the residue by herself. After referring to the previous cases, Lord Thurlow says: "I take it, therefore, it is impossible to say, but that a feme covert is competent to act as a feme sole with respect to her separate property, when settled to her separate use: but the question here goes a little beyond that; it is only how far she may act upon her separate property; I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Still, although thus clearly seeing the distinction which ought, as it would seem, to have been decisive against the claim; he, nevertheless, yields to the authority of the previous cases, and holds the separate estate liable.

The debt in the last case, as well as in the previous cases of Norton v. Turvill, and Standford v. Marshall, was by bond. But it is obvious, that if the principle upon which they were based was sound, it embraced every debt of the wife, however created; whether by bond, note, or by a mere oral promise; and so the doctrine was subsequently applied by Lord Thurlow himself in the case of Lilia v. Airey, 1 Ves. 277. It is true, that in this case the separate estate consisted of a specific sum allowed by the husband to the wife, by way of separate maintenance, and resort has been sometimes had to that fact as explaining the decision. But no reliance is placed upon this circumstance by Lord Thurlow, nor could it properly affect the result. The decision was the legitimate consequence of the theory of the wife's liability adopted in the previous cases.

But the unsoundness of this theory was soon discovered, and it was rejected two years afterwards, in the case of Bolton v. Williams, 2 Ves. 138, by Lord Chancellor Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground, that the securities which the wife had executed operated as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note, which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate, from the time of its executions; still, they were uniformly treated not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, Master of the Rolls, in an anonymous case (18 Ves. 258), where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

But, notwithstanding these inconsistencies, this doctrine that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained substantially unchanged, from the time of its introduction by Lord Loughborough, in Bolton v. Williams, until the case of Murray v. Barlee, 4 Sim. 82, when Lord Brougham rejected the distinction between a written security, and a promise by parol, and extended the rule so as to make the mere parol engagements of a wife a charge, as well as her bond or note. Speaking on that subject, he says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife in equity taken as a feme sole, and can charge it by instruments absolutely void of law, can there be any reason for holding that her liability, or more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play, be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

It is impossible to deny the force and conclusiveness of this reasoning. The distinction which it combats, was clearly untenable. But the learned Chancellor was, I think, less successful in another part of the same opinion in which he attempts to explain the ground upon which it had been previously held, that the bond or note of a married woman, and upon which he held that all her engagements, whether in writing or by parol, were charged upon her separate estate. He says that although originally the courts supposed that, to affect the separate estate, there must be some real charge, as a mortgage, or an instrument amounting to the execution of a power, afterwards the intention of the wife "was more regarded, and the court only required to be satisfied that she intended to deal with her separate property." The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note, or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law, and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence dehors the contract, but an intention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a feme covert was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract: that is, the true meaning of the contract when justly interpreted must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge, that the defendant intended the debt to be a charge, as that intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham in Murray v. Barlee has been since overthrown, and the doctrine based upon it is not now the doctrine of the English courts. In the case of Owens v. Dickenson, 1 Craig. & Ph. 48, Lord Chancellor Cottenham appears to have seen that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what, indeed, is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate to be paid in the order of its priority: while Lord Brougham held that such debts are all to be pari passu. He then argues, very conclusively, to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English Chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property, and appropriates it to the payment of the debt; not on account of anything contained in the contract; not because the wife, by any agreement, either express or implied, has made the debt a charge; but for reasons which I will give in the learned Chancellor's own words: "The separate property of a married woman being a creature of equity, it follows, that if she has a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

This is by no means a return to the primary doctrine of the English courts on this subject. Lord Thurlow never suggested that equity had any power to take the separate property of a married woman and appropriate it to the payment of debts which she had never in any manner charged upon it. It is an attempt to support, by an entirely new process of reasoning, a course of decision which Lord Cottenham plainly saw could not be sustained upon any of the grounds upon which it had been previously placed.

But whether we adopt this last phase which the shifting doctrine in respect to wife's separate estate has assumed or not, it is certain that the judgment in the present case cannot be upheld. As was shown by Judge Comstock when this case was here before, mere equity, not resting upon any positive contract, will never seize upon the separate estate of the wife, and appropriate it to the payment of a debt of the husband, for which she is mere surety; and it follows from what has been previously said, that the estate of the defendant cannot be held liable upon this note, upon the ground that she intended to make it a charge; because to make such an intent of any importance, it must be either expressed or implied in the terms of the contract.

But I am unwilling to leave it to be inferred that I assent to the doctrine of Lord Cottenham. It seems to me even less defensible than the theories which preceded it. Those theories conceded, that the separate estate of a feme covert could not be appropriated in payment of her debt, unless she voluntarily charges such a debt upon her estate. Their error consisted in raising an implication of an actual appointment of charge upon wholly insufficient grounds. But Lord Cottenham's doctrine denies the necessity of any intentional charge of the debt at all by the wife upon her separate estate, although it at the same time makes her power to dispose of that estate the basis of its liability. His argument, when reduced to its simpliest terms is, that a married woman who has a separate estate, has power in equity to charge any debt she may incur upon such estate; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate; but it is clearly impossible to deduce the doctrine from the jus disponendi of the wife, which is its only foundation. The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

These views are not new. Judge Story, in his work on Equity Jurisprudence, says: "It has been remarked, that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as prima facie an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice, than upon any satisfactory reasoning."

The courts of this State have never, as yet, adopted the doctrines of the English Court of Chancery on this subject; certainly not to their full extent: and it would in my view be inexpedient now to do so, for various reasons. If we attempt to follow a class of decisions which obviously rest upon no solid basis or principals, we can never arrive at any settled conclusion. The views of Lord Cottenham are no more likely to be permanent than those of his numerous predecessors. Some future Lord Chancellor may detect the fallacy of his reasoning as he detected that of Lord Brougham. No rule can ever be stable, the reasons given for which are constantly changing. If we desire precision and certainty in this branch of the laws, we must recur to the foundation of the power of a feme covert to charge her separate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain, that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien; upon a well founded presumption that the parties so intended and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence which are applied to similar questions in other cases.

But there is a strong additional reason why this court should decline at this time to adopt the fictitious theories in this subject which have so long prevailed in the English courts. Married women are not hereafter to be indebted to equity merely for protection in the enjoyment of their separate estates. They hold them by a legal title and have a legal right to dispose of them. The acts of 1849 and 1860 are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter entirely inappropriate. I shall not attempt at this time to put a construction upon those acts. That of 1860 authorizes married women to carry on any trade or business upon their own account; but with this exception, the only contracts which it empowers them to make, are those which have direct reference to their separate property: and even this power, where the property consists of real estate, is subjected to a very important restriction; the consent in writing of the husband, or the authority of a court, being rendered essential to its exercise.

These provisions show that the legislature has not even now intended to remove the common law disability of married women to bind themselves by their contracts at large. To be obligatory upon them or their estates under our latest statute, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged. This legislation harmonizes with the views I have advanced in regard to the effect of the contracts of married women. It lends no countenance to the idea that the mere possession of separate estates renders their contracts having no relation to such estates binding upon them. It would be impossible, as it seems to me, to hold, under our statutes, that the mere execution of a security by a married woman not connected by agreement with her estate could be a charge upon it; and yet the power of disposal conferred by these statutes, is, to say the least, as complete as that previously possessed by married women by virtue of the jus disponendi, which resulted from mere ownership. There would, therefore, be a manifest incongruity in holding, in the present case, that prior to our late statutes the debt of a feme covert not connected with her separate estate, not in any manner charged by contract upon it, could be enforced against it, and then deciding, as we evidently must, that under those statutes an actual charge is necessary.

The judgment of the Supreme Court should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; Comstock, C. J., and Denio and Bacon, JJ., upon the ground that the case as now presented did not vary from that when here before. A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.

Judgment reversed, and new trial ordered.[8]

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[8] A fortiori, if there is no intent on the part of the wife expressed to bind her separate estate, her separate estate will not be liable upon a contract of suretyship. Saratoga County Bank v. Pruyn, 90 N. Y. 250 (1882); Willard v. Eastman, 15 Gray (Mass.) 328, 77 Am. Dec. 366 (1860); Williams v. Hugunin, 69 Ill. 214, 18 Am. Rep. 607 (1873); Dismukes v. Shafer (Tenn. Ch.) 54 S. W. 671 (1899).

On the other hand, where the separate estate is charged by explicit words, it is liable for the payment of her obligation as surety for her husband. Webster v. Helm, 93 Tenn. 322, 24 S. W. 488 (1894). National Exchange Bank v. Cumberland Co., 100 Tenn. 479, 47 S. W. 85 (1898).

The same rule which prevails in equity with reference to the married woman's power to charge her separate estate for the debt of another has been held to prevail with respect to her power to charge for the same purpose her legal separate estate created by married women's legislation, like the Illinois act of 1861 (ante, p. 349). Athol Machine Co. v. Fuller, 107 Mass. 437 (1871); Bank of Commerce v. Baldwin, 14 Idaho, 75, 93 Pac. 504, 17 L. R. A. (N. S.)

PERKINS v. ELLIOTT.

(Court of Errors of New Jersey, 1872. 23 N. J. Eq. 526.)

THE CHIEF JUSTICE [MERCER BEASLEY]. The bill in this case alleges that the female defendant, Louisa Elliott, is seized and possessed of certain real and personal estate for her separate use, by force of the statute of this state for the better securing the property of married women, and that having such property she, in conjunction with her husband, made a joint and several promissory note, containing an express provision that it should be a charge upon the separate estate of the feme. The purpose of this action is to enforce this provision, and charge the money due upon this note upon the separate estate of the wife. This the Chancellor refused to do, holding that a married woman invested with the property and interest created by the act just referred to, could not, by her simple contract in writing, bind herself as surety for another so that a court of equity would enforce such obligation against her, even though the intention to bind her separate estate was clear, and was expressed in the instrument executed by her. The precise point of this decision is new to the jurisprudence of this state, and is a question of considerable moment.

[The Chief Justice then reviewed the history of the rise of the married woman's separate estate and the English cases with reference to the nature and extent of her authority over it, and then proceeded as follows:]

I have thus briefly treated the commencement and gradual development of this doctrine, and have endeavored to show that it has been created and fashioned into its present form by courts of equity; that the work, at every step, has been attended with difficulty; that each new application of its cardinal principles presented a vexed question; that judicial opinions, in many important particulars, have been vague and oftentimes discordant, and that the English system, thus formed, has not been received, without many qualifications, by the courts of this country. In this review, the object has been to justify the position taken at the commencement of this opinion, that on this occasion we are not bound by precedents, but are altogether free to adopt such a rule as we may deem, on principles of equity, the true ones to the facts of the case.

The proposition is this: Shall a court of equity enforce against the separate property of a married woman a contract of suretyship made by her, from moral considerations? It seems to me, that for this court to execute such an agreement would be to apply the principle that a

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676 (1908); Grand Island Banking Co. v. Wright, 53 Neb. 574, 74 N. W. 82 (1898); Schmidt v. Postel, 63 Ill. 58 (1872).

In Wilder v. Richie, 117 Mass. 382 (1875), it was held that it did not relieve the married woman from liability upon her contract that she intended to and did give the money obtained to her husband.

feme covert is to be regarded in equity as discovert with respect to her separate estate, and with respect to contracts relating to it, with an unwise latitude. The concession to a feme of a capacity to hold a separate estate, in an absolute form, necessarily carries with it all the powers which are requisite to the enjoyment and disposition of such property. As owner, she can sell it, or encumber it, or transfer it even as a gift. Considering her as the separate proprietor, these capacities are comprehended among the qualities of the estate, with the title to which she is invested. So it may also be forcibly insisted that her general engagements will be charged by equity against her property, the argument being that when she contracts a debt she makes use of her separate property, and, as it were, converts it by anticipation, pro tanto, into money. A feme covert, who borrows money, necessarily does so as the owner of a separate estate, for she can bind herself in no other capacity; the inference, therefore, from such act, certainly is not forced or farfetched, that her intention was to charge her property. I can, therefore, readily comprehend how the English doctrine has grown up, that all the debts incurred by a married woman for her own benefit, or for the benefit of her estate, should be imposed on her individual property, on the ground of a manifest design to create such an encumbrance, and because it is one of the modes of enjoying property, to incur debts on the credit of it. But, when we proceed a step farther, and come to an agreement to stand as the surety of another, I confess I lose sight of the principle on which the general system should rest. Such obligations have nothing to do with the separate estate of the feme. The right to create them is a personal right, unconnected with the ownership of goods or lands, and not embraced in the fullest exercise of the jus disponendi. Such obligations are not, in any sense, necessary, or even convenient, to the enjoyment of her property by the married woman. The true doctrine seems to me this: That to the extent that the feme does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discovert, and cannot bind herself or her possessions.

Nor do I think that the principle which would remove from the present case, and from analogous cases, the disability of the married state, would be a wise or polite regulation. Few women have, or are likely to have, business habits or training. From their habits in life they are necessarily exposed to imposition. They must rely mainly upon others with respect to the legal effect of their acts. To give to such an inexperienced body of persons the right to endorse notes, to accept bills, and to become surety on bonds and other instruments, under the urgency of their husbands, or from the importunities of their relatives or friends, would not be a boon, but a calamity. In my opinion there is nothing in the general doctrines appertaining to the subject, that should compel this court to concede the existence of the power in question, nor is there any consideration of public policy which seems persuasive of such a concession. I agree, therefore, with the Chancellor, as to the general principle, that a court of equity will not effectuate the contract of a married woman, not founded on a valuable consideration, binding her as surety for another.

I have reached this conclusion without drawing any of my reasons from the provisions of the statute of this state for the better securing the property of the married women. The entire effect of that act is, according to my construction, to create in favor of the married woman that kind of estate which would result if these same statutory words were inserted in a deed or a will. The words here used are technical, having long been in use, and their meaning and legal effect have been, in most respects, fully established. They should have the same force, whether found in a private instrument or in a public statute. There is nothing in the context of this act to modify their usual and recognized signification. The purpose of the law is entirely effectuated by putting in the wife that title to her property which is so well known to equity under the designation of her separate estate. It would certainly seem to be greatly incongruous to have two rules of construction appertaining to the same language, the one to be applied to estates limited by settlement, and the other to estates arising, by force of the same terms, under the statutory provision.

But, although my examination of this subject has led me, with respect to the general principle involved, to the same conclusion as that reached by the Chancellor, I find an ingredient in the case which has a controlling effect, and which appears to have escaped attention.

[The Chief Justice then pointed out that since the married woman had become a surety for the debt of her husband for the purpose of taking up a mortgage upon his property in which she had an inchoate dower interest, the contract of suretyship was for her benefit and would for that reason be enforced against her separate estate. On this ground he voted to reverse the decree[4] and give to the complainant the relief prayed for.]

For reversal—BEASLEY, C. J., and BEDLE, CLEMENT, DALRIMPLE, DEPUE, LATHROP, OGDEN, SCUDDER, WALES, and WOODHULL, JJ.—10. For affirmance—none.

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[4] Semble accord: Ewing v. Smith, 3 Desaus. (S. C.) 417, 5 Am. Dec. 557 (1811); Gwynn v. Gwynn, 31 S. C. 482, 10 S. E. 221 (1889); Ritter v. Bruss, 116 Wis. 55, 92 N. W. 361 (1902).

SECTION 3.—UNDER THE FIRST MARRIED WOMEN'S LEGISLATION.

BATCHELDER v. SARGENT.

(Supreme Judicial Court of New Hampshire, 1867. 47 N. H. 262.)

Assumpsit on a promissory note signed by the defendant.

Defence, that the defendant at the time of the making and giving said note was a married woman.

The parties agree upon the following statement of facts:

At the time of the making and giving of said note, the defendant was, and still is, the wife of Samuel Sargent. At that time she was the owner of a farm in Canterbury, on which she and her said husband then, and ever since have resided. Said farm was conveyed to her, several years previously, to her sole and separate use, free from the interference and control of said husband.

The note in suit was given for the price of certain neat stock at that time bought in the name of the defendant, and by her authority, for use on the farm aforesaid, and which was taken and used accordingly on said farm.

BELLOWS, J. The decision of this case must turn upon the question whether the note is to be regarded as a contract made in respect to the farm, for the use of which the stock was bought, within the meaning of the law of 1846, c. 327, § 4; Comp. St. 1854, c. 159, § 15.

Under this statute it has been settled that the note of a married woman given upon a contract not relating to the property he held to her sole use, cannot, in a suit at law, be recovered, Bailey v. Pearson, 29 N. H. 79; that a married woman may lease such property, even to her own husband, Albin v. Lord, 39 N. H. 196; and that no action can be maintained against a married woman upon a promissory note given for money borrowed to pay the price of land to be conveyed to her for her sole and separate use, Ames v. Foster, 42 N. H. 381. This decision is put upon the ground that the power of the wife to bind herself by her contracts under this statute exists only where she at the time holds property to her separate use, and where the contract relates to such property, and therefore she could not bind herself for recovery in anticipation of the purchase of such estate.

The question before us, then, is not touched directly by any previous decision, and it becomes necessary to give a construction to the statutes on this point.

By section 2 of the law of 1846, c. 327, married women are empowered to take, without the intervention of trustees, any real or personal estate conveyed, devised, or bequeathed to them, to their sole and separate use, and to hold, possess, and enjoy the same accordingly;

and by section 4 of that act, it is provided that they shall, in respect to all such property, have the same rights and remedies in their own names, and be liable to be sued upon any contract made or wrong done by them in respect to such property, both at law and equity, in the same manner and with the same effect as if they were unmarried—thus putting them in respect to such property upon the same footing as if sole.

They may, therefore, sell, lease, mortgage, cultivate and improve, or otherwise manage and dispose of such lands, in the same way and manner as if unmarried; and such is the doctrine of Albin v. Lord, 39 N. H. 202. It must follow, of course, that they may bind themselves to pay for the means of repairing the buildings and fences, and making improvements of the estate, and for the necessary labor and expenses in its cultivation; and also, we think, for such tools and other farming implements, and such stock of cattle, horses and other animals, as may be needed for the cultivation of the estate in a profitable and husbandlike manner.

That a married woman may herself carry on a farm held to her sole and separate use, can admit of no doubt, and this implies the power to contract for the necessary means of stocking it in a suitable manner; for without it she could not carry it on at all. Such a contract must, therefore, be regarded as made in respect to the property so held. As to that she is put by the statute in all respects upon the footing of a feme sole, and there is nothing in that statute, or in the policy of our legislation, that indicates a purpose to withhold from her the powers which others enjoy in the disposition and management of similar property.

These provisions of our statutes are, after all, but modifications of well established doctrines of equity in respect to the contracts of the wife who holds property to her separate use. At law, it is true, she could not bind herself or her property by a contract made during coverture, except as a trader by the custom of London; or where her husband had adjured the realm, or was civilly dead. In the celebrated case of Corbet v. Podnitz, 1 T. R. 5, it was held that a wife having a separate maintenance and living apart from her husband, was liable at law on her contracts as a feme sole. This case, however, was repeatedly questioned, and the contrary doctrine at length established in the case of Marshall v. Rutton, 8 T. R. 545.

In equity it has been for a long time well settled that a married woman, holding property to her sole and separate use, is so far to be regarded as a feme sole in respect to such property that she may dispose of it as she pleases; and as incident to that power may charge it with her debts contracted during coverture; unless, indeed, there be something in the deed or gift to restrict her. If in contracting the debt the intention to charge her separate estate is manifested, courts of equity will enforce payment out of that estate; and it seems now to be settled that such intention will be inferred where she contracts a debt during her marriage, by bond, bill, or note, or other express contract in writing, upon the ground that unless it be so held such contract would be totally inoperative. In respect to implied promises of the wife, and promises not in writing, there has been some conflict in the authorities, many of the more modern cases holding that there is no solid ground for any distinction, and that courts of equity should decree payment of both classes of debts out of her separate estate. Among these cases are Owens v. Dickinson, 1 Craig & Phillips, 48, 52 and 54, quoted in 2 Story's Eq. Jur. 1397, note 1; Murray v. Barlee, 3 Mylne & Keen, 209, where there was an able opinion by the Lord Chancellor Brougham, affirming the opinion of Vice Chancellor Shadwell in the same case, reported in 4 Simons, 82. The opinion of Lord Brougham is quoted at some length in 2 Story's Eq. Jur. § 1400, note 1. To the same effect are Ozley v. Ikelheimer, 26 Ala. 332, Burch v. Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553, and Greenough v. Wiggington, 2 Greene (Iowa) 435.

The general subject is discussed and the authorities collected in 2 Story's Eq. Jur. §§ 1399, 1401; Clancey on Husband and Wife, c. 9; 2 Kent's Com. (9th Ed.) 156, § 164 et seq., and notes; Methodist Episcopal Church v. Jaques, 3 Johns. Ch. (N. Y.) 77, modified on error as reported in 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Holme v. Tenant, 1 Bro. Ch. 14, and notes; 1 Mad. Ch. 473, 474.

It will be observed, however, that these debts are a charge only upon the wife's separate estate, and that she is in no case personally bound even in equity. The great change, by our statute, is to enable her to hold such property without the intervention of a trustee, and to make her liable at law personally as well as her estate, for debts contracted by her in respect to it.

As the general engagements of the wife, all those at least which take the form of bonds, bills or notes, would, by a decree of a court of equity, be satisfied out of her separate estate, debts contracted in respect to such property would of course be included. Among the cases of that kind is Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, where a court of equity decreed satisfaction out of the wife's separate estate of a bond given by her to the husband for money borrowed to erect or complete buildings, upon that estate; and also Murray v. Barlee, 3 Mylne & Keen, 209, before cited, where payment out of her separate estate of a solicitor's bill was decreed. In some of the cases, in discovering the intention of the wife to charge her separate estate, stress has been placed upon the fact that the debt was contracted for the benefit of such estate. Yale v. Dederer, 22 N. Y. 450, 78 Am. Dec. 216.

From this statement of the doctrines of courts of equity, it is apparent that to hold the wife liable for the price of cattle purchased to stock her farm is no extension of her former liability, except so far as it binds her personally; and that is clearly contemplated by the statute.

The power to hold property to the wife's sole and separate use necessarily implies a power to hold whatever is essential to make that use beneficial, such as farming tools, stock, and the like; and as incident to holding such tools and stock, must be right to purchase them and pledge her credit for the price. To hold that she could not so pledge her credit would go far to deny her right to hold them, as against her husband.

The conclusion we have reached is also, we think, in accordance with the clearest dictates of justice. The wife has used her credit to stock her farm, and she enjoys the benefit of it; and a decision which should discharge her from the obligation to pay for it, would not only be painfully unjust and productive of much mischief in that direction, but would, we are persuaded, be inconsistent with the policy of our legislation, which is to place the wife in respect to such separate property upon the footing of a feme sole.

To decide that she is not liable for property so purchased in any form, and at the same time to enable her to hold it against the seller, would arm the husband and wife with a power for mischief that could not have been contemplated by the framers of this law. There must be, therefore,

Judgment for the plaintiff.[5]

PALLISER v. GURNEY.

(Supreme Court of Judicature, Queen's Bench Division, 1887. L. R. 19 Q. B. D. 519.)

Motion by way of appeal from a decision of the judge of the City of London Court. The action was brought against a married woman, without joining her husband as defendant, for goods sold and delivered to her in 1885. At the trial the sale and delivery of the goods to the defendant were admitted, but the plaintiff offered no evidence to shew that the defendant was possessed of any separate property when the goods were ordered and supplied, and the learned Commissioner gave judgment for the defendant, but gave leave to appeal.

Lord ESHER, M. R. This judgment must be affirmed. The defendant was sued for wine ordered by her in her own name, as Mrs. A. Gurney; and she was sued without joining her husband as defendant. The question is, whether the order, which would be a binding contract if she were a feme sole, binds her as a married woman; and this depends on the construction of the Married Women's Property Act, 1882. It is said that this statute makes a married woman personally liable upon contracts entered into by her in her own name; but if that was the intention it is not expressed, though it might easily have been expressed. If there are any words in the statute which express that intention they are to be found in subsection 2 of section 1: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," etc. The section limits the capacity of the married woman to bind herself by the words "in respect of and to the extent of her separate property." It is clear that she is not given an unlimited capacity to enter into and be bound by any contract. Moreover, this point was considered by Pearson, J., in In re Shakespear, Deakin v. Lakin, 30 Ch. D. 169, and in giving judgment he said: "In my opinion, according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it." With that statement I entirely agree. As to the argument founded on subsection 3, that subsection presupposes the existence of separate property, and the capacity of the married woman to contract which arises therefrom, and provides that, if that capacity exists, then the contract shall bind her separate property unless the contrary be shewn.

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[5] Accord: Nispel v. Laparle, 74 Ill. 306 (1874). But see Boughner v. Laughlin's Ex'x, 64 S. W. 856, 23 Ky. Law Rep. 1166 (1901).

LINDLEY, L. J. I am of the same opinion. The true construction of section 1 of the Married Women's Property Act, 1882, is to confer upon married women who have separate property a power to contract with reference to it. Subsection 2 of section 1, which is the clause giving this power, is an enabling clause giving a power of contracting in respect of and to the extent of the separate property, and it is obvious that, unless the separate property exists, the married woman is not bound by the contract; and, therefore, those who assert the existence of a contract binding the married woman must first shew the existence of the separate property. Subsection 3 presupposes that some contract binding separate property has been entered into—that is presupposes the existence of separate property at the time of making the contract, for otherwise there is no power to contract—and then provides that such contract shall bind her separate property, that is, that her separate property shall be liable to her general engagements, a matter about which there was some question before the passing of the Act. I agree with the decision of Pearson, J., in In re Shakespear, Deakin v. Lakin, 30 Ch. D. 169. It therefore follows that the plaintiff failed in making out his case, and that the judgment appealed from must be affirmed.

Appeal dismissed.[6]

[Opinion of LOPES, L. J., omitted.]

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[6] Accord: Jones v. Crosthwaite, 17 Iowa, 393 (1864), married woman not liable for price of land wich she had contracted to purchase; Ames v. Foster, 42 N. H. 381 (1861), married woman not liable for money borrowed to complete the purchase of land already deeded to her to her separate use.

SIDWAY v. NICHOL.

(Supreme Court of Arkansas, 1896. 62 Ark. 146, 34 S. W. 529.)

RIDDICK, J.[7] * * * The second question is, did the court err in rendering judgment against the estate of Mrs. Nichol for the amount of the note executed by her? The complaint alleged that the consideration for the note was money loaned to Mrs. Nichol. As this allegation was not denied, we must take it as true; and the question presented is whether a married woman, under our law, has the right to borrow money for her own use and benefit, and whether or not she becomes personally liable for the payment of a note executed for such money.

It has been frequently held by this court that a married woman may make a contract for the benefit of herself or her separate estate, and that such contract will be enforced against her separate property. Stowell v. Grider, 48 Ark. 220, 2 S. W. 786; Collins v. Underwood, 33 Ark. 265; Stillwell v. Adams, 29 Ark. 346. This was the law before the passage of the statutes enabling married women to acquire and hold property in their own right, free from the control of their husbands, and without the aid of a court of equity. The promissory note of a married woman, given for money borrowed by her before the passage of the enabling statutes, would have been enforced in equity against her separate estate. Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Miller v. Brown, 47 Mo. 506, 4 Am. Rep. 345; Boatmen's Savings Bank v. Collins, 75 Mo. 281; Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611; Davis v. First Nat. Bank of Cheyenne, 5 Neb. 242, 25 Am. Rep. 484; 2 Kent, 151; Lawson, Rights, Rem. & Prac. § 749. Such a contract, before the enabling statutes were passed, created no personal liability against her, for the reason that the separate property of married women before the passage of such laws was altogether a creation of a court of equity.

By the common law she could make no contracts. The contracts of a married woman were void at law, and were not recognized by courts of law. Inasmuch as her creditors had no means, at law, of compelling the payment of her debts, the courts of equity, which had created her separate estate, took upon themselves to enforce her promises, not as personal liabilities, but by laying hold of her separate property, as the only means by which they could be satisfied. Owens v. Dickenson, Craig & P. 48, 54; Pike v. Fitzgibbon, L. R. 17 Ch. D. 454; 3 Pom. Eq. § 1122, and cases cited. If the married woman had no separate estate, her creditors were without a remedy, for the proceedings to enforce her promises made in reference to her separate estate were not against her personally, but against her separate estate. It was a peculiar remedy, formulated by courts of equity to enforce promises which at law were void. Ex parte Jones, L. R. 12 Ch. D. 484; 3 Pom. Eq. § 1122, and note.

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[7] Part of opinion relating to another point omitted.

While the law stood in this condition, our constitution was adopted, and statutes were enacted providing that property owned by a married woman at the time of her marriage, or acquired afterwards, should be and remain her sole and separate property; allowing her to bargain, sell, assign, and transfer such property, and to engage in trade or business on her own account; providing that no bargain or contract made by her in respect to her sole and separate property, business, or services shall be binding on her husband, or render him or his property in any way liable therefor, but that she may alone sue or be sued in the courts of this state on account of said separate property, business, or services; and further providing that any judgment against her may be enforced by execution against her sole and separate estate or property to the same extent and in the same manner as if she were sole. Sand. & H. Dig. §§ 4945–4951.

The object and effect of these statutes were to make a radical change in the law as regards the rights and powers of married women. Every married woman of this state who acquired property after the passage of these laws became at once the owner of a separate estate. It is no longer an equitable estate, to be recognized alone by courts of equity; but it is, by virtue of the statute, a legal estate, recognized by courts of law as well as of equity. These laws do not give the wife power to contract generally. Her note given as surety for the debt of another would not bind her, or be enforced against her property. But they do give her power to contract in reference to her services, her separate estate, and in respect to a separate business carried on by her. The statute not only authorizes her to make such contracts, but expressly provides that she may alone sue or be sued in the courts of this state on account of such "property, business, or services." Sand. & H. Dig. § 4946. It has been twice held by this court that under this statute the contracts of a married woman in relation to her separate business create a personal liability against her. Hickey v. Thompson, 52 Ark. 238, 12 S. W. 475; Trieber v. Stover, 30 Ark. 727. It follows, upon the same reasons, that a contract in reference to her separate property creates also a personal liability; for the statute intends such contracts,—as much so as it does those concerning her separate business. "The right to contract," said Justice Scholfield in Haight v. McVeagh, "is indispensable to the acquisition of earnings, and to the unrestricted possession, control, and enjoyment of property." Haight v. McVeagh, 69 Ill. 628; Hickey v. Thompson, supra. The purpose of the statute was to permit married women to acquire and hold property without the intervention of a trustee or a court of equity. In order that she may be free to acquire property, it permits her to make contracts, binding upon herself in regard to such property; and it provides that her husband shall not be liable upon such contracts, but that she alone may be sued thereon. So we think that, if this was a contract in reference to the separate property of Mrs. Nichol, it created a personal liability against her, and the judgment was proper. Imprisonment for debt having been abolished, the only effect of a personal judgment against a married woman is to render her property liable for its satisfaction.

Was this a contract in regard to the separate property of Mrs. Nichol? It is contended that Mrs. Nichol at the time she borrowed this money had no separate estate, and therefore it was not such a contract. If a married woman who owns separate property binds that property to pay for other property which she buys, such property becomes a part of her separate estate. "If she has no separate estate," says Mr. Kelly in his work on Contracts of Married Women, "there has been considerable conflict on the question whether or not she can purchase on a credit, so as to create a separate estate; yet the true doctrine appears to be that a married woman can purchase on credit, and the purchase will be her separate estate." Kelly, Contracts of Married Women, p. 160. In a Michigan case the defendant, a married woman, was sued for the price of furniture purchased by her. Among other defenses, it was contended that the contract did not concern her separate property, and was therefore not within the statute. In an opinion delivered to Mr. Justice Cooley, he said: "The contract is for the acquisition of sole property; and the title to it, or at least a right in relation to it, vests when the contract is made. There is, therefore, no straining of terms in saying that the contract has relation to her sole property. The statutes on this subject establish a new system. * * * The rule which they establish is one of general capacity to own property, and to make valid contracts, binding in law and in equity, in relation to it; and I discover nothing in the statute which so limits that capacity as to prevent her making the first acquisition, any more than any subsequent one, on credit." Tillman v. Shackleton, 15 Mich. 456, 93 Am. Dec. 198. In the case of Wilder v. Richie, 117 Mass. 382, it was held that a married woman may bind herself by agreements for the acquisition of property to her separate use, and that no distinction could be made between money and other personal property. In Building & Loan Ass'n v. Jones, 32 S. C. 313, 10 S. E. 1079, the Supreme Court of South Carolina held that, when a married woman borrows money, it becomes at once a part of her separate estate, and that her contract to repay it is a contract with reference to her separate estate, which may be enforced against her.

Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not. Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Arthur v. Caverly, 98 Mich.

82, 56 N. W. 1102; Russel v. Bank, 39 Mich. 671, 33 Am. Rep. 444; Johnson v. Sutherland, 39 Mich. 579; Gaynor v. Blewett, 86 Wis. 401, 57 N. W. 44; Haydock Carriage Co. v. Pier, 74 Wis. 585, 43 N. W. 502; Houghton v. Milburn, 54 Wis. 564, 12 N. W. 23, and 11 N. W. 517; Conway v. Smith, 13 Wis. 125; Haight v. McVeagh, 69 Ill. 625; Cookson v. Toole, 59 Ill. 515; Orr v. Bornstein, 124 Pa. 311, 16 Atl. 878; Hibernia Savings Ins. Co. v. Luhn, 34 S. C. 184, 13 S. E. 357. To hold otherwise would be to say that, although the statute gives a married woman the right to acquire and hold property, yet if she undertakes to acquire it by contract, the law will treat such contract as of no validity. Under that view of the statutes, a married woman who had no separate estate could make no valid contract for the acquisition of property, however desirable and beneficial the ownership of it might be to her. If she was a seamstress, and needed a sewing machine, or a music teacher, and needed a piano, she could make no contract for a purchase upon credit. If she borrowed money with which to purchase property, her note given for the money would be void. This was her condition before the passage of the enabling acts. Such a construction, it seems to us, would, to a large extent, nullify the statutes which were intended to emancipate married women from many of the trammels of the common law, and permit them to contract for, acquire, and hold property.

We have not overlooked the case of Walker v. Jessup, 43 Ark. 167, and other cases by this court, holding that a married woman cannot make an executory contract for the purchase or conveyance of land binding upon her or her heirs.[8] There may be reasons why the executory contracts of a married woman in respect to real estate should not be enforced against her. That question is not before us, and we do not overrule those cases. But, so far as the former decisions of this court may have intimated that the contracts of a married woman in respect to her separate property, and for its benefit, though valid and binding upon her in equity, create no personal obligation on her part, and can only be enforced by a proceeding in a court of equity against her separate property, the same are overruled.

The decree of the chancellor is affirmed.[9] Motion for rehearing overruled.

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[8] Contra: Faucett v. Currier, 109 Mass. 79 (1871). See, also, Messer v. Smyth, 58 N. H. 298 (1878); Kriz v. Peege, 119 Wis. 105, 95 N. W. 108 (1903), holding that a married woman may acquire a leasehold by purchase and be liable for the rent, though she has no business or separate estate other than that purchase.

[9] Accord: Scottish Co. v. Deas, 35 S. C. 42, 14 S. E. 486, 28 Am. St. Rep. 832 (1892).

KOCHER v. CORNELL.

(Supreme Court of Nebraska, 1899. 59 Neb. 315, 80 N. W. 911.)

SULLIVAN, J. This action was brought by Samuel R. Kocher against Isabel Cornell and her husband to recover a money judgment. The question propounded by the record is this: Is the property which a married woman acquires by inheritance, after the execution by her of a contract of suretyship binding her separate estate in general terms, liable for the satisfaction of such contract? According to the doctrine of the common law, a feme covert was incapable of contracting a personal obligation. Her ownership of property was not even recognized. In equity, however, a different rule prevailed. Although she could not, according to the equity doctrine, create a personal liability against herself, her separate estate was liable for the satisfaction of engagements made with reference to it. Her contract was regarded as binding, not upon her, but upon her estate. The property, as was said in London Chartered Bank v. Lempriere, L. R. 4 P. C. 597, was considered the real debtor. Our statute has greatly enlarged the capacity of married women to contract, but it has not entirely removed her ancient disabilities. The authority given her by section 2, c. 53, Comp. St. 1899, is authority to contract with reference to her separate estate. Its practical effect, since imprisonment for debt has been abolished, is to give legal recognition to the previously existing equitable power. In other words, the legislative design, it seems to us, was to give to married women, as a legal right, the power over their property which in equity they already possessed. If we are right in regard to this, a married woman can bind her separate property now by contracts with reference to it, only to the same extent that she could formerly bind it in equity. Whether she possessed power independent of statute to bind by contract property subsequently acquired has been before the English courts in several cases. In Pike v. Fitzgibbon, L. R. 17 Ch. D. [Eng.] 454, Brett, L. J., discussing the question said: "The decisions appear to me to come to this: That certain promises (I use the word 'promises' in order to show that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered." In the same case James, L. J., after observing that the point was not necessarily involved, took occasion to remark: "It is therefore sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property * * * that a married woman had at the time of contracting the engagement which it is sought to enforce." The question was afterwards directly presented for decision in King v. Lucas, L. R. 23 Ch. D. [Eng.] 712, and it was there held that the contract of a married woman could only be enforced against the separate estate existing at the date of the contract. Following these precedents it was decided in Ankeney v. Hannon, 147 U. S. 118, 13 Sup. Ct. 206, 37 L. Ed. 105, that, in the absence of special legislation, the property which a married woman obtained by inheritance after the execution of the contract upon which the action was brought was not bound, although there was an express declaration of her intention to charge "her separate estate, both real and personal." Other authorities supporting this view are Crockett v. Doriot, 85 Va. 240, 3 S. E. 128; Filler v. Tyler, 91 Va. 458, 22 S. E. 235; Roberts v. Watkins, 46 L. J. Q. B. [Eng.] 552; Clark, Contracts, 280; 3 Pomeroy, Equity Jurisprudence (1st Ed.) § 1123. A mere hope of succession to an estate is not property; and authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman cannot be said, by any fair construction of language, to include it. The estate which Mrs. Cornell acquired by inheritance was not her separate property at the time the obligation in suit was given, and, therefore, it cannot be said that the contract was made with reference to it. What the intention of the parties was in regard to the matter is not material, since the power to bind after-acquired property did not exist.

In conferring upon married women a limited capacity to contract, it was quite natural that the legislature should make the grant of power commensurate only with the necessity for it. The fundamental doctrine of liability being that the wife's separate estate should be held to answer for debts contracted on the faith of it, the requirements of the situation were fully met by the adoption of the statute making such debts a charge upon the estate in existence when the contract was entered into. Indeed, this conclusion seems to be the logical result of the past adjudications of this court holding that the engagements of a woman under coverture are without binding force, except to the extent that they have been made a specific or general charge upon her separate property. See Grand Island Banking Co. v. Wright, 53 Neb. 574, 74 N. W. 82; State Savings Bank v. Scott, 10 Neb. 83, 4 N. W. 314; Eckman v. Scott, 34 Neb. 817, 52 N. W. 822; Godfrey v. Megahan, 38 Neb. 748, 57 N. W. 284; Buffalo County Nat. Bank v. Sharpe, 40 Neb. 123, 58 N. W. 734. While, under the provisions of section 3, c. 53, Comp. St. 1899, a married woman may be sued upon her contracts, the theory of the law still is that the property, on the faith of which she obtained credit is the real debtor, and consequently constitutes the only fund from which a creditor may obtain satisfaction of his claim. The judgment of the district court is affirmed.[10]

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[10] Accord: McKell v. Merchants' Nat. Bank, 62 Neb. 608, 87 N. W. 317 (1901); Parratt v. Hartsuff, 75 Neb. 706, 106 N. W. 966 (1906). In Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336 (1907), it was held that the contract by a married woman in 1864, when she had no "separate estate," to make a will in favor of A., was unenforceable after her death by A.

MAJOR v. HOLMES.

(Supreme Judicial Court of Massachusetts, 1878. 124 Mass. 108.)

Three actions of contract upon promissory notes made by husband and wife after the St. of 1874, c. 184, took effect. The consideration of the note in each case was a debt of the husband to the payee, and not the money advanced or expended on the separate property of the wife. The first action was brought against the wife alone after the death of the husband. The second and third actions were brought against both husband and wife.

Each case was submitted upon the facts above stated to the Superior Court, which gave judgment for the plaintiff; and the defendants appealed.

Gray, C. J. Before the St. of 1874, c. 184, the female defendant would not have been liable in either of these cases, because contracts could only be made by a married woman in reference to her separate property, business or earnings. Gen. St. c. 108, § 3; Williams v. Hayward, 117 Mass. 532; Nourse v. Henshaw, 123 Mass. 96.

But this statute has removed that restriction, and in the broadest terms enables a married woman to "make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole," and does not require that the consideration of her contracts should enure to her own benefit. The provision that nothing in this act shall authorize her "to convey property to, or make contracts with, her husband," is evidently not intended to impose any new restriction on her capacity, but merely to affirm the rule of the common law, so far as her husband is the other party to her grant or contract; and does not prevent both of them from binding themselves by a joint promise to a third person, within the authority conferred by the statute. Parker v. Kane, 4 Allen, 346.

The female defendant in each of the cases before us is therefore liable to the plaintiff upon her contract with him, although, by reason of her incapacity to contract with or to sue her husband, no contract of indemnity could be made or implied as between them, as there might be in the case of two promisors capable of contracting with and suing each other. A contract of indemnity between principal and surety is no part of, and nowise affects their contract with the creditor. Penniman v. Vinton, 4 Mass. 276; Carpenter v. King, 9 Metc. 511, 43 Am. Dec. 405.

Judgments affirmed.[11]

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[11] Mayo v. Hutchinson, 57 Me. 546 (1870); Taylor v. Boardman, 92 Ill. 566 (1879); Grandy v. Campbell, 78 Mo. App. 502 (1899); Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480 (1871).

IONA SAVINGS BANK v. BOYNTON.

(Supreme Court of New Hampshire, 1897. 69 N. H. 77, 39 Atl. 522.)

Assumpsit on the promissory note of the defendant, a married woman. Facts found by the court. The note was signed by her at the request of her husband, who told her he needed the money. She signed the note to help her husband in his business, and authorized him to secure its discount and dispose of the proceeds. The defendant's husband applied to the plaintiffs for a loan of $5,000, with 60 shares of the capital stock of the Tilton Hosiery Company as collateral. They declined to make the loan, but told him that if his wife desired to borrow that amount with the same security, the loan would be made. Shortly afterward he brought to the bank the note in suit, with the collateral above named, and received the amount of the plaintiff. He deposited the avails in the Citizens' National Bank to the credit of the Tilton Hosiery Company, of which he was treasurer. The defendant never met or had any talk with any officer of the bank relative to the loan. Upon the foregoing facts the court found a verdict for the plaintiffs for the amount due on the note, and the defendant excepted.[12]

WALLACE, J. The case discloses that the plaintiffs refused to make the loan to the husband, but did make it to the wife alone upon a note signed by her to which the husband was not a party, and that the hiring of the money by the defendant from the plaintiffs was the independent contract of the wife as principal and not as the surety or guarantor of the husband. The fact that she hired the money with the intention of letting her husband have it to assist him in his business, and did so let him have it, did not impair or suspend her legal capacity to make the contract, or make it an undertaking for him or in his behalf within the meaning of the statute. Parsons v. McLane, 64 N. H. 478, 13 Atl. 588; Jones v. Holt, 64 N. H. 546, 15 Atl. 214; Wells v. Foster, 64 N. H. 585, 15 Atl. 216. Exception overruled.[13]

PARSONS, J., did not sit. The others concurred.

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[12] The statute in force in New Hampshire at this time appears in Pub. St. 1891, c. 176, § 2. It is as follows: "Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried: Provided, however, that the authority hereby given to make contracts shall not affect the laws heretofore in force as to contracts between husband and wife; and provided, also, that no contract or conveyance by a married woman, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her, except a mortgage releasing her right of dower and homestead."

[13] Accord: Veal v. Hunt, 63 Ga. 728 (1879); Rood v. Wright, 124 Ga. 849, 53 S. E. 390 (1906); Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. Rep. 274 (1901).

CHAPTER VII

CONVEYANCES OF MARRIED WOMEN

SECTION 1.—AT COMMON LAW

LANE v. SOULARD.

(Supreme Court of Illinois, 1853. 15 Ill. 123.)

The bill alleges: That Soulard conveyed certain property in St. Louis to trustees, to hold in trust for appellant, a married woman, provided she shall pay out of her separate estate, the sum of $9,000, payable in four installments; that said Soulard agreed to complete the improvements then in progress, by the 1st October, 1846; that to secure the payment of the first installment more fully, being $2,000, to be paid 1st October, 1846, the appellant and her then husband executed a deed of trust to a part of the defendants, as trustees for certain lands in Illinois, owned in her right, which authorized the sale of said lands, on the failure to pay said first installment, and out of the proceeds to pay, first, the cost, and then the sum of $2,000; that upon the failure to pay any or all of the installments, or the interest, out of the separate estate of said Margaret B. Lane, the property in St. Louis should be sold for the payment thereof.

That said Soulard failed to complete said improvements in the time and according to his contract, and that, at the March term of the St. Louis circuit court in the year 1851, said Soulard obtained a decree for the sale of the property in St. Louis, under which decree said property was sold, and purchased by said Soulard for the sum of $6,600; that said first installment formed a part of said decree, and that the proceeds of said sale ought to be applied to the discharge of said installment; that she was a married woman at the time of the execution of the deed of trust for lands in Illinois; that the consideration of the deed of trust had failed, and that it would not be just to allow Soulard to enforce the payment and still hold the property in St. Louis. The bill further charges that her land has been sold for taxes, and calls upon the court to require the trustees to proceed at law to recover said property, and to enjoin the sale until the title is settled. The answer admits the contract as set out by appellant, alleges that he has completed his contract, admits the proceedings in St. Louis, and sets up the decree in St. Louis as conclusive as to the amount due —to which there is a replication.

This cause was heard before Underwood, Judge, at August term, 1853, of the St. Clair Circuit Court.

CATON, J. Although many points were raised and ably argued in this case, we shall confine ourselves in the decision to one single question, which is unavoidably decisive of the whole case. The Revised Statutes repealed all the former laws on the subject of conveyances of real estate, and authorized married women within this State to convey their land by joining with their husbands and acknowledging the deeds in a specified way; but no authority was given for married women residing out of this State to convey their lands lying within it. The law thus continued till the act of the 22d of February, 1857, which authorizes married women without the State to convey their lands lying within this State.

In April, 1846, Mrs. Lane, with her husband, executed this deed of trust, in the city of St. Louis, where she then resided. The deed of trust conveys the premises in question to certain trustees, to secure the payment of certain moneys to Soulard. The question is, whether this was a valid conveyance of the premises. We shall not stop to adduce authorities to show, that a feme covert cannot, except she be authorized by an express statute convey her fee-simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute, she is incapable of conveying by deed as she is by word of mouth. From 1845 to 1847, there was no statute enabling married women without the state to convey their lands within it. This deed having been made without the authority of law, and against law, was simply void; as void as if it had been expressly prohibited by a positive statute. The second section of the law of 1847, provides that a feme covert not residing in this State, being above the age of eighteen years, may join her husband in the execution of deeds, &c., of lands lying within this State, and that she shall thereby be barred of her right in like manner as if she was sole, and the acknowledgment of such deed may be made in the same manner as if she was sole, and the section concludes: "And the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings, heretofore, as well as those which may hereafter be executed." The third section provides that such deeds, &c., which had been or might thereafter be executed without the State and within the United States, and acknowledged or proved in conformity to that statute, should be admitted to record, and read in evidence without further proof. Admitting that here was the deliberate purpose on the part of the legislature, to give effect to conveyances made by married women out of the State, during the two years when they were not authorized to make such conveyances, and the question arises, Had they authority to make such deeds operative? We cannot bring our minds to entertain a doubt that the legislature had no such authority. Notwithstanding this deed of trust, Mrs. Lane was, on the 21st of February, 1847, as much the absolute owner of this land as if she had never made such a deed. That deed affected her right to it in no way whatever, any more than if it had continued a blank piece of paper, or her name had been forged to it by another, instead of being written by herself. She was no more authorized by law to put her name to that deed, so far as giving it effect was concerned, than a stranger had to write it for her. If the legislature could give effect to a deed thus executed against the provisions of the law, then they could make a deed at once which would convey the title. If they could by force of law make her title pass where none had passed before, then it is the law which passes the title and not the deed. It is the act of the legislature and not her own act, which deprives her of her land. If, on the 21st of February, she was the absolute owner of this land, unaffected, uninfluenced, unprejudiced by any thing which she had previously done or suffered, and on the 23d of February, she had ceased to own it, by whose act had the title passed? Not by her own act, certainly, for she had done nothing in the mean time or previously, which could transfer the title. How then had it passed? By the act of the legislature alone. She had not done it, for she could not in any way, shape, or form, pass the title; but the legislature had taken her land from her and given it to others. This they are expressly prohibited from doing, by the constitution.

In support of the constitutionality of this law, we have been referred to several decisions in Pennsylvania, and in some other States, and in the Supreme Court of the United States. Nor is this the first time that our attention has been called to these cases. Without, at the present time, expressing any opinion upon the propriety of those decisions, it is sufficient to say, that they are upon cases not like this; but to sustain this law we should have to go further than any of these courts have gone, in sustaining legislative control over titles to real estate. Indeed, the protection intended to be secured by the constitution would be quite thrown down, and they would be left to dispose of the titles of individuals as they please. In those cases the law had authorized the parties to convey, but the conveyances had been imperfectly executed or acknowledged, and the curative laws had been passed to remedy such defects, and to confirm contracts which had been authorized by law to be made. Upon this ground all those decisions were made. But the case before us is quite different. Here, the law authorized no such contract whatever. In each of those cases there was an imperfect or defective execution of a power. Here is a total want of power. There, there was a capacity to act and an attempt made to exercise that capacity. Here was a total incapacity to act, and whatever was attempted to be done, was in direct violation of the law. Here, the party had attempted to do nothing which the law had authorized her to do. Here, there was no defect to remedy, but the entire act was void, not for the want of form, but for the want of power; and we are very clearly of opinion that the legislature could not give effect to a conveyance, which the law prohibited her from making, and thus transfer a title by the mere farce of a legislative act.

The decree of the circuit court must be reversed, and a decree entered in this court, enjoining the trustees named in the deed of trust from proceeding to sell under that deed.

Decree reversed.[1]

MANCHESTER v. HOUGH.

(Circuit Court of the United States, First District, 1828. 5 Mason, 67, Fed. Cas. No. 9,005.)

Ejectment for certain lands in Providence. Plea, the general issue. The town of Providence, under whom the defendants claimed, took upon themselves the defence.

The facts, as they appeared at the trial, were as follows:—On the 30th of September, 1797, Isaac Manchester (since deceased) and Mary Manchester, his wife (the present plaintiff), were seized in fee simple, in her right, of the demanded premises. On the same day, they conveyed, by their deed of that date, to Samuel Nightingale, the treasurer of the town of Providence, for the use of the town, one portion of the lands in controversy, to hold to him and his successors in the office forever. This deed was, on the same day, acknowledged by the grantors to be their voluntary deed, before G. T., a justice of peace of the same town. On the 4th of May, 1799, the said Isaac and Mary made a conveyance by deed of that date, of the residue of the demanded premises to the same treasurer, in like manner for the use of the town of Providence; which deed was acknowledged in the same manner. At the time of executing the first deed, there was no statute in Rhode Island authorizing a feme covert to convey her lands by deed, joining her husband therein.

The question was, whether the deed of 1797, operated as a legal conveyance of the wife's estate. The acknowledgment of the deed of 1799 was admitted not to be according to the provisions of the statute of Rhode Island of 1798 on this subject.

Story, Circuit Justice. This case depends upon the validity of the conveyances made of the wife's estate by herself and her late husband, by the deeds of 1797 and 1799. It is admitted, that the latter deed cannot bind the wife according to the statute of Rhode Island of 1798, § 7 (Digest 1798, p. 267), because she has not been examined privily and apart from her husband, and made an acknowledgment, that the deed was her voluntary act, and that she did not wish to retract the same, before the magistrate taking the acknowledgment. Without a compliance with these requisites, the statute declares, that the deed shall not operate to convey any greater estate in the premises, than what belongs to the husband.

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[1] Accord: Higgins v. Crosby, 40 Ill. 260 (1866); Rogers v. Higgins, 48 Ill. 211 (1868). Observe that on similar reasoning the deed of an infant married woman, joined in by her husband and acknowledged in the manner proper for married women, was held wholly void, and not subject to be confirmed when the married woman came of age. Hoyt v. Swar, 53 Ill. 134 (1870); Harrer v. Wallner, 80 Ill. 197 (1875).

The validity of the other conveyance in 1797 turns upon the question, whether, by the common or customary law of Rhode Island, a feme covert can convey her real estate by deed, her husband joining in the deed. It is not denied, that this was in Rhode Island the usual mode of conveying her estate antecedently to the statute of 1798; and that it had prevailed without objection and without question for a great length of time; and that this is the first time, in which it has been judicially brought into controversy. Conveyances by fine or common recovery of the estates of femes covert may have sometimes been resorted to by very cautious persons; but the general practice in Rhode Island has been, as I have stated. Many titles have passed, and many titles are now held exclusively under such conveyances. And to shake their validity would at this period be productive of incalculable mischiefs. If there ever was a case, in which the doctrine might be fairly applied, that communis error facit jus, the present is that case. In truth, from an early period in the history of New England, the right of a feme covert to convey her real estate by deed with the assent of her husband was recognized, and has been constantly enforced by courts of law. It now constitutes a part of the common law of New England.[2] It probably originated in the necessities of the country at an early period of its settlement, when fines and recoveries were little known; or if known, Courts were rarely held, and understood little of the proper mode of proceeding. The same necessity has produced a similar result in other parts of the Union.[3] The act of 1798 can be justly considered in no other light, than as a legislative sanction and recognition of the right and the practice. My opinion accordingly is, that the deed of 1797 is sufficient to pass the estate of the feme covert to the premises described therein.

Verdict accordingly.

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[2] Durant v. Ritchie, 4 Mason, 45 Fed. Cas. No. 4,190 (1825); Gordan v. Haywood, 2 N. H. 402 (1821).

[3] Lloyd v. Taylor, 1 Dall. 17, 1 L. Ed. 18 (1768); Davey v. Turner, 1 Dall. 11, 1 L. Ed. 15 (1764).

Quære: As to whether a married woman can convey as a feme sole where her husband has deserted her? See Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854 (1897).

SECTION 2.—IN EQUITY

LAW AND OPINION IN ENGLAND, by A. V. Dicey, pp. 375–377: "The Court of Chancery having thus created separate property for a married woman, by degrees worked out to its full result the idea that a trustee must deal with the property of a married woman in accordance with her directions. Thus the Court gave her the power to give away or sell her separate property, as also to leave it to whomsoever she wished by will, and further enabled her to charge it with her contracts. With regard to such property, in short, equity at last gave her, though in a roundabout way, nearly all the rights of a single woman. But equity lawyers came to perceive, somewhere towards the beginning of the nineteenth century, that though they had achieved all this, they had not given quite sufficient protection to the settled property of a married woman. Her very possession of the power to deal freely with her separate property might thwart the object for which that separate property had been created; for it might enable a husband to get her property into his hands. Who could guarantee that Barry Lyndon might not persuade or compel his wife to make her separate property chargeable for his debts, or to sell it and give him the proceeds? This one weak point in the defences which equity had thrown up against the attacks of the enemy was rendered unassailable by the astuteness, as it is said, of Lord Thurlow. He invented the provision, constantly since his time introduced into marriage settlements or wills, which is known as the restraint on anticipation. This clause, if it forms part of the document settling property upon a woman for her separate use, makes it impossible for her during coverture either to alienate the property or to charge it with her debts. Whilst she is married she cannot, in short, in any way anticipate her income, though in every other respect she may deal with the property as her own. She may, for example, bequeath or devise her property by will, since the bequest or devise will have no operation till marriage has come to an end. But this restraint, or fetter, operates only during coverture. It in no way touches the property rights either of a spinster or of a widow. The final result, then, of the judicial legislation carried through by the Court of Chancery was this. A married woman could possess separate property over which her husband had no control whatever. She could, if it was not subject to a restraint on anticipation, dispose of it with perfect freedom. If it was subject to such restraint, she was during coverture unable to exercise the full rights of an owner, but in compensation she was absolutely guarded against the possible exactions or persuasions of her husband, and received a kind of protection which the law of England does not provide for any other person except a married woman."

BAGGETT v. MEUX.

(High Court of Chancery, 1846. 1 Phil. Ch. 627.)

On the hearing of an appeal in this case from the decree of Vice-Chancellor Knight Bruce, the argument turned chiefly on the question, whether a clause in restraint of alienation, annexed to a legal devise in fee, of real estate to a married woman for her separate use, was effectual during the coverture.

The Lord Chancellor after disposing of the other points of the case in a few words, said, with respect to this: After the case of Tullett v. Armstrong, 4 My. & Cr. 377 [s. c. 1 Beav. 1, 1 Keen, 429], there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman; and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal: but a Court of Equity having created in both a new species of estate, may in both cases modify the incidents of that estate.

Appeal dismissed, with costs.[4]

TAYLOR v. MEADS.

(Court of Appeal in Chancery, 1865. 4 De Gex, J. & S. 597.)

This was an appeal by the Plaintiff from the dismissal of his bill with costs by the Master of the Rolls under the circumstances hereinafter stated.

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[4] In Bell v. Bair, 89 S. W. 732, 28 Ky. Law Rep. 614 (1905), a conveyance by a married woman in defiance of a restraint on the alienation of her fee simple was held void, and the married woman was entitled to recover back the land.

A fortiori, the restraint when attached to a married woman's separate equitable interest for life is valid and an attempted alienation in defiance of the restraint is void. Jackson v. Hobhouse, 2 Mer. 483 (1817). The restraint on alienation is equally effective, though it is created by the act of the woman in settling her own property upon herself. See Clive v. Carew, 1 Johns. & H. 199 (1859).

In Jeanneret v. Polack, 15 N. S. W. R. Eq. 192 (1894), it was held that a contract by a married woman to convey her separate estate when she should become discovert was in violation of the restraint on alienation attached to her separate estate, and unenforceable.

Under the will of William Meads, made in 1841, and in the events which had happened at the date when Elizabeth Meads, the wife of Percy Meads, made her will as hereinafter mentioned, some freehold cottages were vested in trustees upon trust only for her (she being described in the will as the wife of Percy Meads), her heirs and assigns, and to be assigned, released, conveyed, or otherwise well and effectually assured by her to any person or persons whomsoever, his, her or their heirs or assigns, in such manner as she should at any time or times, and notwithstanding her coverture, direct or appoint, by any instrument in writing to be by her signed, sealed and delivered in the presence of and attested by two or more credible witnesses, and in default of such direction or appointment, and so far as the same should not extend, in trust only for her, her heirs and assigns for ever, with a declaration of the testator's express will and meaning to be that she should, notwithstanding her coverture, stand possessed of the property for her sole and separate use and benefit, and that the same should not in any manner be subject or liable to the debts, control, engagements or interference of Percy Meads.

Elizabeth Meads never formally exercised her special power of appointment over the property, but by her will made in May, 1845, she gave and devised all her real and personal estate over which she had a disposing power to her husband Percy Meads, his heirs, executors, administrators and assigns forever absolutely.

Her will was executed with all the formalities required by the New Wills Act, 1 Vict. c. 26, but was not under the seal of the testatrix.

The testatrix died in November, 1845, and the legal estate in fee of the property was got in by her surviving husband, Percy Meads.

He died in July, 1860; and in 1862 the Appellant, who was the heir at law of Elizabeth Meads, instituted this suit against the Respondents, who were respectively tenant for life and tenant in fee in remainder of the property in question under Percy Meads' will as Defendants, seeking a declaration that Elizabeth Meads' will did not operate as a valid execution of the power of appointment vested in her under William Meads' will, and that the Appellant was entitled to the property as her heir at law, and for consequential relief.

The Master of the Rolls held that the will of Elizabeth Meads operated as a valid execution of the power of appointment vested in her under William Meads' will: and so holding dismissed the Appellant's bill, as has been stated, with costs: at the same time abstaining from giving any opinion upon a second question which had been argued before his Honor, namely, whether the testatrix had not, under William Meads' will, a power of disposition over the property by will in default of her exercise of the special power of appointment by virtue of her separate estate in the property, and as an incident to that separate estate.

Upon the present appeal these two questions were both again argued.

THE LORD CHANCELLOR [Lord WESTBURY—after holding that the will of Elizabeth Meads did not operate as a valid execution of the power of appointment, proceeded as follows:]

This gives rise to the next question, upon which there has been no decision in the Court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a feme sole. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the Statute for the Abolition of Fines and Recoveries; and can she, during coverture, devise the equitable estate by a will executed in conformity with the statute?

There is no difficulty as to the principle.

When the Courts of Equity established the doctrine of the separate use of a married woman and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a feme sole. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the feme coverte is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is sui juris.

To every estate and interest held by a person who is sui juris the common law attaches a right of alienation, and accordingly the right of a feme coverte to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation.

But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her trustees; and the true theory of her alienation is, that any instrument be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the feme coverte's equitable interest; and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete, both at law and in equity.

With regard to ordinary equitable estates belonging to a feme coverte, for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee (who afterwards marries), equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be conveyed inter vivos in the same manner as a legal estate: and in like manner an estate of this nature cannot be devised by a feme coverte, for the incapacity to make a will of lands by the 14th section of the 34 & 35 of Hen. VIII, c. 5, is in this respect not removed by the Act of 1 Vict. c. 26; but the interest created by the separate use is the creature of a Court of Equity, to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband and personal disability in the wife.

The violence thus done by Courts of Equity to the principles and policy of the common law as to the status of the wife during coverture is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences.

It is right to advert in few words to the statute law and to the decided cases.

By the 14th section of the Statute of Wills, 34 & 35 Hen. VIII, c. 5, it was enacted, that wills or testaments made of any manors, lands, tenements or other hereditaments by any woman coverte should not be taken to be good or effectual in the law. This enactment no doubt, referred to lands vested in a feme coverte in fee simple, and of which her husband was seised jure uxoris. Courts of Equity appear to have considered it as not applicable to separate estate, which was unknown at the time of the passing of the statute.

Between that time and the Act of the 1 Vict. c. 26, the doctrine of the separate use was fully established, and the feme coverte, when not restrained from alienation, was considered in equity as entitled to the same rights of alienation over her separate property as are possessed by persons sui juris.

Then followed the present Wills Act, 1 Vict. c. 26, by the 8th section of which it is enacted, that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of the Act.

This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a feme coverte, when not restrained from alienation, has in equity the same jus disponendi over her separate estate by deed or will as she would have if free from the disability of coverture.

In addition to Peacock v. Monk, 2 Ves. 190, and the well known decisions of Lord Thurlow, it is sufficient to refer to Tullett v. Armstrong, 1 Beav. 1; Baggett v. Meux, 1 Ph. 627, the judgment of the Lord Justice Turner in Atchison v. LeMann, 23 L. T. 302; and, finally, to the recent case of Adams v. Gamble, 11 Ir. Ch. 269, 12 Ir. Ch. 102; in the Court of Appeal in Ireland, where the point was expressly determined from the earlier decisions. Lord St. Leonards, in his book on Powers, page 173 (8th Ed.), derived the same conclusion, which he states in these words: "Where a married woman has property settled to her separate use without any restraint on alienation, she is deemed a feme sole, and may dispose of it accordingly."

I must hold, therefore, that a feme coverte, where not restrained from alienation, has, as incident to her separate estate and without any express power, a complete right of alienation by instrument inter vivos or will.

It was contended at the bar that the effect of this devise was to give the married woman an estate to her separate use only during the joint lives of herself and her husband, with remainder to herself in fee. But that is not the true construction of the will—the estate given to Elizabeth Meads is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman.

It was also contended that inasmuch as a special power of appointment was in terms given, no further power of disposition ought to be implied; but it is well settled that a special power of appointment does not derogate from the right of disposition which is incidental to ownership; and here the will of Mrs. Elizabeth Meads is a valid disposition, not as an exercise or by virtue of any power of appointment, but by virtue of that right of alienation which, when not prohibited, is incidental to the separate estate in fee.

I cannot, therefore, concur with the judgment of the Master of the Rolls, or with the order which he has made, and which must be reversed, and in lieu thereof declare that the will of Elizabeth Meads was not a good execution of the power given to her to appoint by an instrument in writing to be by her signed, sealed and delivered, but was a valid devise of the estate given to her and her heirs, and which it was declared by the will of the testator she should hold for her separate use, and dismiss the bill without costs.

TURNER v. SHAW.

(Supreme Court of Missouri, 1888. 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319.)

Ejectment for an undivided one-sixth part of lots 519 and 520 in block 65 in the City of Louisiana, Missouri.

The plaintiff and defendant are brothers and sisters, children and heirs at law of their father and mother, John F. and Sarah Ann Turner. John F. Turner in June 1861 executed a deed of conveyance to the property in question to his wife "to her sole use and benefit." In September 1874 the wife, Sarah Ann Turner, in consideration of the sum of five dollars, reconveyed the same property to her husband. Both John F. Turner and his wife Sarah in 1878 conveyed the property belonging to them to their two daughters, Sally and Mary, but omitted to include in said conveyance lots 519 and 520 in block 65 in question. John F. Turner died, devising lots 519 and 520 to his two daughters Sally and Mary, subject to a life estate in their mother. Sally conveyed her interest to Mary, who is the defendant. In 1882 Sarah Ann Turner died apparently intestate. The plaintiff claims as one of the heirs at law of his mother, the lots in question. The defense set up was that the deed of John F. Turner and his wife executed in 1878 should be reformed on the ground of mutual mistake, so as to include the lots in question. There was a judgment for the plaintiff below and the case comes to this Court by appeal.

SHERWOOD, J.[5] [after holding that the evidence below was insufficient to warrant a decree for a reformation of the deed in question, continued as follows:]

II. But there is another aspect in which this case is to be regarded, one which appears to have escaped the attention of both court and counsel; it is this: The deed from a husband to a wife, or from the latter to the former, are null in law, this arising from their being regarded as one person. Very differently, however, are they regarded in a court of equity. There they may sue and be sued, contract and be contracted with, become the debtor or creditor of each other, with like effect, so far as regards equitable contemplation and rights, as if they twain had never become one flesh. Morrison v. Thistle, 67 Mo. 596, and cases cited; 1 Bish. Mar. Wom. §§ 35, 37, 713, 717. The deed of 1861, from John F. Turner to his wife, while it did not vest in her a legal title to the lots in litigation, still passed to her an equitable estate.

III. And the estate thus created in the wife was an equitable separate estate. This is apparent for two reasons: (1) Because the language of the habendum of the deed last mentioned is: "To have and to hold unto the said Sarah Ann Turner, and to her sole use and benefit." Morrison v. Thistle, supra. (2) Because the deed was made directly from the husband to the wife. If the deed had been made by a stranger to the wife, then, a separate estate in her would not have been created, absent the necessary words; but being made to the wife by the husband, a separate estate, as against him, was the result. Deming v. Williams, 26 Conn. 226, 68 Am. Dec. 386; Huber v. Huber, 10 Ohio, 371; Steel v. Steel, 36 N. C. 452; Maraman v. Maraman, 4 Metc. (Ky.) 84; McWilliams v. Ramsay, 23 Ala. 813; 1 Bish. Mar. Wom. § 838.

IV. It being then established that, in consequence of the deed of 1861, the wife became the owner of an equitable separate estate in the land thereby conveyed, what was the effect of her deed made back again to her husband in 1874? I can regard it as having but one effect, and that was to convey to him the same lands, that is, her equitable estate therein, which prior thereto she had been the recipient of from him. This must have been the effect of the deed of 1874, or else it had no effect at all. But it may be urged that this deed was utterly invalid, because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hinderance from her husband. With regard to such property, she is, in equity, a feme sole, and has the jus disponendi, which is the inseparable incident of ownership. By virtue of this, she charges, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere. Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 537; Whitesides v. Cannon, 23 Mo. 457; King v. Mittalberger, 50 Mo. 182; McQuie v. Peay, 58 Mo. 56; Claflin v. Van Wagoner, 32 Mo. 252; Schafroth v. Ambs, 46 Mo. 114; Kimm v. Weippert, 46 Mo. 532, 2 Am. Rep. 541; Lincoln v. Rowe, 51 Mo. 571; De Baun v. Van Wagoner, 56 Mo. 347; Gay v. Ihm, 69 Mo. 584; 1 Bish. Mar. Wom. § 853; 2 Bish. Mar. Wom. § 163; Taylor v. Meads, 34 Law J. [N. S.] Ch. 203.

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[5] Statement of facts abridged from the opinion, and part of opinion only given.

It is upon the idea that a feme covert, possessed of a separate estate, may convey it, that gave origin, in the conveyances creating such estates, to clauses against alienation. 1 Bish. Mar. Wom. § 844. Such clauses, the invention of Lord Thurlow, amount to a constant assertion of the power which the feme possesses but for such prohibitions. These views are contrary to those expressed in Martin v. Colburn, 88 Mo. 229; but the opinion there was by a divided court, and, satisfied now that it was erroneous, we all agree to overrule that case.

V. The husband being the possessor of the legal estate in the lots in question, and having received from his wife all the equitable estate which, by his deed of 1861, he had conveyed to her, it results that at the time he made his will, he had full power and ownership to dispose of the lots as he would; and that no reformation of the deeds of 1878 was necessary.

We reverse the judgment and remand the cause with directions to enter judgment for the defendant. With the exception of RAY, J., absent, all concur.[6]

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[6] Accord: Cadematori v. Gauger, 160 Mo. 352, 61 S. W. 195 (1901); Young v. Graff, 28 Ill. 20 (1862).

A married woman has full power over the transfer of her separate estate in personal property as if she were sole. Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398 (1866).

SECTION 3.—UNDER VARIOUS MARRIED WOMEN'S ACTS

CARPENTER v. MITCHELL.

(Supreme Court of Illinois, 1870. 54 Ill. 126.)

Mr. Justice WALKER delivered the opinion of the Court:

The bill charges that, on the thirteenth day of April, 1869, Rebecca Strickle was the owner of certain lands described in the bill, and that she sold and conveyed them to Henrietta M. Carpenter, and conveyed them by warranty deed; that Isaac Strickle, her husband, joined her in the conveyance, which was duly acknowledged and recorded; that the consideration for the sale of the land was $4750, of which $2500 was paid in hand, and the balance was to be paid in instalments, the first on the twenty-fifth of December, 1868; the second, the twenty-fifth of December, 1869, and the third, the twenty-fifth of December, 1870, all drawing six per cent. interest.

It also charges that the grantors in the deed reserved, in terms, a vendor's lien for the unpaid purchase money, and a similar lien was expressly given in the notes until the purchase money should be paid, and the notes expressly state that they are given for the purchase money of the lands; that the notes were all endorsed to defendant in error by Rebecca Strickle before they became due, and that he owned the same, and that they are unpaid, although the first had become due. Prayer that Henrietta and Samuel Carpenter be made parties; that an account be taken on the first note; and for a decree that it be paid, or, in default, that the land be sold, or so much as might be necessary to satisfy the note, and the remainder stand as security for the notes still to fall due, for general relief. A demurrer was filed, but was overruled.

Thereupon, leave was granted to defendants to file a cross-bill, which they did. It admits the material allegations of the original bill, but insists that, as Henrietta was a married woman at the time the notes were given, she was incompetent to give the notes, and they are void. She offers to rescind the contract, and restore the land subject to the lien she holds on the same, to secure her in the $2500 of purchase money she paid when the conveyance was made to her; that she is ready to re-convey the land to the grantor, or to defendant in error, if they will repay her the money. Prayer that the contract be rescinded, and that the money she paid be decreed to her, and that defendant in error, or Mrs. Strickle, be required to receive a re-conveyance, and the purchase money paid be a lien on the land.

The answer admits the material allegations of the original bill. It insists that the reservation of the lien in the deed and notes does not change the rights of the parties; that the lien is not assignable, and that plaintiffs in error did not sign the deed, and that the reservation of the lien is not a written contract, and is void under the statute of frauds; that the vendor's lien was waived by taking Carpenter, the husband, as security on the notes. Henrietta defends the bill, on the ground that she was a married woman when the notes were given, and offers to rescind the contract, if Mrs. Strickle, or defendant in error, will refund the money she paid, with interest, and she offers to account for rents and profits. A replication was filed, and an answer to the cross-bill was filed and a replication interposed to it. A hearing was had on the original bill and cross-bill, and the answers thereto, the replications, exhibits and proofs, when the court below granted the relief sought in the original bill.

[The court, after denying the contention that the vendor's lien in question was not transferable, proceeded as follows:]

It is next urged that the sale is void because Mrs. Carpenter was a married woman, and could not for that reason, make a valid contract or a binding purchase. This may have been true, in a qualified sense, before the adoption of the act of 1861, usually called the "married woman's law." At common law, a married woman could not bind herself or property, but in equity, she might, in many cases, charge her separate property. To prevent her from perpetrating fraud and injustice, she could be compelled to perform her agreements in a class of cases, by subjecting her separate property to her contracts. The first section of the act of 1861 (Gross' Comp. 439) declares that all property belonging to a married woman as her sole and separate property, or such as she owns at her marriage after the passage of the law, or which she may acquire in good faith from any person other than her husband, by descent, devise, or otherwise, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and controlled by her as if she were sole and unmarried.

This provision contemplates the acquisition of property in different modes by married women, and a fair interpretation of the language employed embraces a purchase by her. It names the acquisition by descent and devise, and instead of limiting it to that mode, enlarges the power by recognizing other unenumerated modes, by the expression, "or otherwise," which is broad enough to embrace a purchase. If, then, the statute authorizes a married woman to purchase real estate, she must, when she exercises such a power, do it on the same terms and conditions which attach to others not under disability, so far as to be bound by her purchase, and to render her separate property,. in equity liable to discharge indebtedness thus incurred. While she can not bind herself at law, as hitherto decided, she may bind her separate property in equity. So far as we can see, Henrietta deliberately purchased this property, acting on her own judgment, inducing others to part with their property, and it may be, thus inducing them to incur other liabilities from which they cannot escape, and if permitted to rescind, and they be compelled to refund money paid, it would produce great inconvenience, and perhaps loss and injury; but, be that as it may, having the power to make the purchase, and to create the lien, the property thus purchased and placed under the lien, must be held liable for its discharge and satisfaction. If this was no more than an unexecuted contract, a court of equity might not interpose to compel its execution, but it being executed by having received a conveyance, it is highly equitable that the purchase money be paid by subjecting the land to sale for the purpose.

When this case was previously before the court (50 Ill. 470), we said the plaintiff must resort to a court of equity. If he had conveyed to her the property without taking back a mortgage, and if she still held the title, he could ask that the land be sold for the payment of the balance of the purchase money, or that the contract be rescinded; or if she and her husband had conveyed to an innocent purchaser, the plaintiff might ask for payment from the proceeds of the sale. Although this was not a mortgage, it was a contract of such a character that a court of equity must treat it as such, which renders what was then said applicable to the case as now presented, and as the land has not been sold to an innocent purchaser, it must be held bound for the payment of the balance of the purchase money. There is no force in the objection that the sale was decreed to be made after thirty days. We have seen that this is a lien given by express contract, and in the nature of, if not a mortgage, and the sale should be on redemption, and appellant can not complain, as redemption is allowed for one year after the sale, and thirty days after the decree was ample time before the sale was required to be made. Had the sale been without redemption, then the time before the sale would have been insufficient. We perceive no error in the record, and the decree must be affirmed.

Decree affirmed.[7]

BRESSLER v. KENT.

(Supreme Court of Illinois, 1871. 61 Ill. 426, 14 Am. Rep. 67.)

Mr. Justice SHELDON delivered the opinion of the court:

Sabrina Bressler, a married woman, executed, without the concurrence of her husband, as a party, her separate deed of trust of certain real estate owned by her, to secure the payment of a promissory note given by herself and husband for a debt of the latter, and the question presented by this record is, did she thereby charge such real estate with the payment of the debt, and will a court of equity, by a proceeding against the property, subject it to the payment of such charge?

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[7] Accord: Weller v. Monroe, 55 S. W. 1078, 21 Ky. Law Rep. 1705 (1900). But see Elder v. Jones, 85 Ill. 384 (1877).

By the common law, the only mode in which a married woman had power to transfer her title or interest in real estate, was by levying a fine or suffering a common recovery.

Our statute of conveyances has provided that, when any husband and wife residing in this State shall wish to convey the real estate of the wife, it shall and may be lawful for the husband and wife to execute any deed, etc., for the conveying of such land, and that such deed (after the solemnities of examination and acknowledgment) shall be as effectual in law as if executed by such woman while sole and unmarried.

It is only in the precise mode prescribed by the statute, that a married woman can make a valid conveyance of her lands. That mode was not pursued in the present case, as the husband did not join in the execution of the deed, and the deed of trust did not create a valid lien upon the land. Cole v. Van Riper, 44 Ill. 58; Moulton et ux. v. Hurd, 20 Ill. 137, 71 Am. Dec. 257.

Such is the rule at law, and the one that must govern in this case, unless the rule in equity shall be held to apply, that the separate estate of a married woman will, in equity, be held liable for all the debts, charges, incumbrances and other engagements which she does expressly, or by implication, charge thereon. 2 Story, Eq. Jur. § 1399.

There is a distinction in this respect, in equity, between the separate property of a married woman and her other property. As to the former, she is treated as a feme sole, having the general power of disposing of it; but as to the latter, all the legal disabilities of a feme covert attach upon her. Id. § 1397.

It is to be considered, then, whether the estate in question was the separate estate of the wife, in the sense of that term, as recognized and acted upon by a court of chancery, and subject to be disposed of by herself alone. Separate estates in married women, which courts of equity recognize their right to dispose of as femes sole, are strictly equitable estates. They are always created by deed, devise or marriage settlement, and the character of separate estate is impressed upon them by the terms of the instrument creating them.

It was formerly deemed absolutely necessary that the property should be vested in trustees, and, in strict propriety, that should always be done, though it has been established that the intervention of trustees is not indispensable. 2 Story, Eq. § 1380.

It is not because the entire interest in an estate is vested in a feme covert that renders it of the description of a separate estate in her. A separate estate in feme covert only exists in such property, whether it be real or personal, as is settled upon her for her separate use, without any control over it on the part of her husband. It is not all the estate, either in lands or chattels, belonging to a feme covert, nor is it her right of dower in the real estate of her husband. Albany Fire Ins. Co. v. Bay, 4 N. Y. 9.

The facts in this case disclose no such separate estate in Mrs. Bressler.

It is claimed that since the passage of the act of February 21, 1861, entitled "An act to protect married women in their separate property," any real estate which a married woman owns in her own right will, in equity, be regarded as her separate property, and subject to all the incidents of such property, as before recognized in a court of chancery.

That act provides, "that all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The estate created by the act is as fully for the separate use of the wife as it could have been made by virtue of the provisions of any instrument in writing.

The rule in equity, that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she were sole, must be understood only of personal property, and of the rents and profits of real estate during her life.

The wife's own reversion in lands, when she owned them at the time of the marriage, was a legal estate descendible to her heirs, to which courts of equity did not apply the doctrine stated. In reference to such an estate, she had only the disposing capacity which the common law or some enabling statute allowed to her.

So, if an estate is, during coverture, given to a married woman and her heirs, for her separate use, without more, she can not, in equity, dispose of the fee from her heirs, but she must dispose of it, if at all, in the manner prescribed by law, as in England, by fine or recovery, and here, by the solemn conveyance required by the statute. But if, in such a case, a clause is expressly superadded, that she shall have power to dispose of the estate so given to her during her coverture, then courts of equity will treat such a power as enabling her effectually to dispose of the estate.

Thus the limitation of real estate to the wife in fee to her sole and separate use, did not give her, in equity, the power to dispose of the fee from her heirs; to do so, an express power of disposition must have been given to her by the instrument.

These principles appear to be supported by the following authorities: 2 Story, Eq. Jur. §§ 1391, 1392, 1397; 2 Roper on Husb. & Wife, 182; Clancy on Married Women, 287, and cases cited in notes to these authorities; Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Same v. Same, 22 N. Y. 450, 78 Am. Dec. 216; Newlin v. Freeman, 39 N. C. 312.

The act referred to gives no power to dispose of the estate. Cole v. Van Riper, 44 Ill. 58. It only reserves it to the sole and separate use of the wife. Hence, even under the full application of this doctrine of equity, the wife would have no sole disposing power over the fee of her real estate.

But a married woman's separate estate, under this act, is a strictly legal separate estate, and we see no reason why she should not hold it subject to the ordinary disabilities resulting from her coverture; why the statute should not have full operation upon it, and the mode therein prescribed be the only one whereby a married woman can dispose of her real estate.

What has been said is entirely aside from the question how far a married woman, as a necessary incident to the enjoyment of her separate property, may contract as to matters pertaining to the enjoyment of its use, and is to be taken without any bearing upon such a question.

The case of Young and Wife v. Graff, 28 Ill. 20, seems to afford a warrant for the decree of the court below.

Upon fuller consideration, we think the doctrine of equity, as to a married woman's disposing power over her separate property, was carried further in that case than the authorities seem to warrant.

We regard the deed of trust in this case as invalid, and that the decree of the court below, for the sale of the premises purporting to be conveyed by it, was erroneous.

The decree must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.[8]

BEAL v. WARREN.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 447.)

Tort for breaking and entering the plaintiff's close and cutting and carrying away ten cords of wood.

The plaintiff deduced his title as follows: A deed from Simeon Warren dated May 21, 1851, conveying the premises to a married woman to her sole and separate use without the intervention of a trustee. Deed by a married woman dated November 11, 1851, conveying to the plaintiff. The plaintiff took possession under this deed. The cutting and carrying away of the wood complained of occurred subsequently. The Judge instructed the jury that although the deed to the plaintiff would not convey to him the estate of Mrs. Quindley [the married woman] in the premises, yet that she, being in occupation of them, and having the management of them, so far as the evidence showed, with the assent of her husband, or at least without objection or interference on his part, in connection with the possession taken by the plaintiff under it, there was sufficient evidence of such a tenancy by the plaintiff as would enable him to maintain this action against mere wrongdoers without any title, such as the defendants were. To these instructions the defendants excepted.

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[8] In Lewis v. Graves, 84 Ill. 205 (1876), the mortgage by the married woman alone of her separate estate was held not in any event to be a lien till it was so established by the decree of a court of equity, and hence was subject to a lien subsequent to the date of the mortgage, but before the lien of the mortgage was so established by decree. See, also, Elder v. Jones, 85 Ill. 384 (1877). But see Thompson v. Scott, 1 Ill. App. 641 (1878).

In Cole v. Van Riper, 44 Ill. 58 (1867), it was held that there was no power in the married woman alone to convey her separate estate at law.

The presiding judge, upon the authority of Beach v. Manchester, 2 Cush. 72, ruled that the plaintiff's deed from Mrs. Quindley, and his possession under it, did not convey to the plaintiff a title sufficient to entitle him to recover the value of the wood cut and carried away by the defendants, but only damages for the injury to his possession. The jury returned a verdict for nominal damages. And the plaintiff excepted to this last ruling.

Thomas, J.[9] [after holding that the instruction of the Judge to the effect that the plaintiff had such possession as would entitle him to maintain his action apart from title was right, continued as follows:]

2. The second question raised by these exceptions is, what effect, if any, is to be given to the deed of Mrs. Quindley to the plaintiff. This question depends upon the construction to be given to the statute of 1845, c. 208, giving authority to married women to hold property to their separate use, without the intervention of trustees.

The deed of Simeon Warren to Mrs. Quindley was made under this statute. It was a grant of an estate to her and her heirs, in fee simple, "to be held by her, without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband, agreeably to the statute in such cases provided." Mrs. Quindley made to the plaintiff a deed of the land, her husband then living. The question is, what title or interest, if any, the plaintiff took under this deed. The effect of the deed depends upon the construction of the statute of 1845, c. 208. As the separate deed of a married woman, it would be at common law, or under the previous statutes of the Commonwealth, simply void.

The fifth section of this provides that whenever any property shall be secured to any married woman, or conveyed, devised or bequeathed to her, pursuant to the provisions of the statute, "such woman shall, in respect to all such property, have the same rights and powers, and be entitled to the same remedies in her own name, at law and in equity, and be liable to be sued at law and in equity, upon any contract by her made or any wrong by her done in respect to such property, and also upon any contract by her made or wrong by her done before her marriage, in the same manner and with the same effect as if she were unmarried; and all such property may be attached in any such suit, and may be taken on execution, as if she held the same, being unmarried."

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[9] Statement abridged and part of the opinion is omitted.

Section 7 provides that if any married woman, holding property to her separate use by virtue of this act, shall die intestate, all her right and interest in any personal property thus held shall vest in the husband, unless other provision is made in relation thereto by the terms of the contracts or conveyances under which she holds; and that he shall be entitled to his estate by the curtesy in all lands and tenements held by his wife, as if this act had not been passed.

The language of the statute is broad and comprehensive, giving to a married woman, holding property by this tenure, the same rights and powers, and entitling her to the same remedies at law and in equity, in relation to such property, as if she were unmarried, conferring upon her authority to make contracts in relation to it, and making her liable to be sued at law and in equity upon such contracts, and in such suits rendering the property liable to attachment and seizure on execution. Clearly she could dispose of the property indirectly; for she could render herself liable upon contracts to its full value. And she can do it directly, if we give full force and effect to the language conferring upon her "the same rights and powers, in respect to such property, as if she held the same, being unmarried."

In the consideration of this point, our chief embarrassment has arisen from the case of Beach v. Manchester, 2 Cush. 72; not from the point decided, but from the view there expressed of the statute. * * * The authority of a case as a precedent is limited to the point decided. The point decided was, that the will of a married woman, made without the consent of her husband, assuming to dispose of property which had been secured to her separate use under the statute of 1845, c. 208, but which, under the eighth section of that statute, she had, after her marriage, conveyed to a trustee, without reserving any power to dispose of such property by will, was not valid, and could not be admitted to probate.

Upon careful consideration of the view then taken of the [5th section of the] statute, a majority of the court think it is not sound; but that the fifth section confers upon a married woman, holding property under the statute, the right and power of conveying such property, by deed, subject only to the limitation, contained in the seventh section, of the rights of the husband as tenant by the curtesy, or other restrictions or limitations contained in the instrument under which she holds. The result is, that the deed of Mrs. Quindley to the plaintiff conveyed to him her entire interest in the estate, that is the fee simple, subject to the curtesy of the husband. Such being the estate taken under the deed of Mrs. Quindley, he was entitled to recover the value of the wood taken by the defendants.

Plaintiff's exceptions sustained, and new trial ordered in this court.[10]

KUHN v. OGILVIE.

(Supreme Court of Pennsylvania, 1896. 178 Pa. 303, 35 Atl. 957.)

Scire facias to foreclose a mortgage executed by Thomas Ogilvie and Ada, his wife, March 1, 1894, to secure the debt of the former. The property mortgaged was owned in fee by the wife. Judgment for the plaintiff. The wife appeals.[11]

MITCHELL, J. A mortgage being in many respects treated as a mere security, though in form a conveyance, it might well have been held that a mortgage by a married woman to secure her husband's debt is in substance a contract of suretyship, which she was not, at common law, capable of making. But on the other hand, she has, under the law of Pennsylvania, the right of every owner to convey her estate, subject to certain conditions as to mode, etc., and as she could sell or mortgage and give the money immediately to her husband, there was no substantial reason why she should not subject her estate to a merely contingent liability for the same purpose. When the case of Hoover v. Samaritan Society, 4 Whart. 445, came before this court, the latter argument prevailed, and it was held that a married woman could use a power of appointment to execute a mortgage as collateral to her husband's bond for money loaned to him.

This view has been steadfastly adhered to, and it is now the established rule that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person: Haffey v. Carey, 73 Pa. 431; Hagenbuch v. Phillips, 112 Pa. 284, 3 Atl. 788; Du Bois Deposit Bank v. Kuntz, 175 Pa. 432, 34 Atl. 797.

This being settled, the only question left open in the present case is whether the rule has been changed by the act of June 8, 1893 (P. L. 344). It will be observed that the cases last cited were decided after the married woman's act of 1848, and it was held that the capacity of a married woman to mortgage her estate was not affected by that act, the purpose of which was to restrict the husband's power and that of his creditors, not that of the wife herself.[12] The act of 1893 is a further step in the same direction, and instead of contenting itself with restricting the power of the husband, it affirmatively enlarges the power of the wife. The first section provides for her control over her estate, including conveyance and mortgage of realty when her husband joins. The second section authorizes her to "make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." It is upon this last clause that the argument for the appellant rests. It is clear however that this was a cautionary provision against too liberal a construction of the very large powers conferred by the first part of the section, a saving of the previously existing disability so far as it covered the particular class of contracts specified. The general intent of the act is so plainly in enlargement of her contractual capacity, that nothing less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act.

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[10] See Brown v. Pechman, 49 S. C. 546, 27 S. E. 520 (1897); Id., 53 S. C. 1, 30 S. E. 586 (1897).

[11] Statement abridged.

[12] Accord: Edwards v. Schoeneman, 104 Ill. 278 (1882); Stevenson v. Craig, 12 Neb. 464, 12 N. W. 1 (1882); Holmes v. Hull, 50 Neb. 656, 70 N. W. 241 (1897).

The case of Patrick v. Smith, 165 Pa. 526, 30 Atl. 1044, arose under the act of 1887, and there is nothing in it in conflict with this view of the act of 1893. A wife indorsed her husband's note, which plaintiffs discounted and passed to her credit, and she immediately drew a check to her husband's order for the whole amount. At maturity the husband paid part of the note and the wife gave her note for the balance which plaintiffs discounted, and she again drew her check to her husband's order for the proceeds. On this note she was sued. It was held that her action throughout was for the accommodation of her husband, and that the statute could not be evaded by such a "transparent device" to which the plaintiffs were party. Real Estate Co. v. Roop, 132 Pa. 496, 19 Atl. 278, 7 L. R. A. 211, also arose under the act of 1887, and the strict construction given there probably had much influence in the passage of the act of 1893, with enlarged grant of contractual capacity in express terms.

Judgment affirmed.[13]

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[13] Accord: Siebert v. Valley Nat. Bank, 186 Pa. 233, 40 Atl. 472 (1898). Under an act providing, "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract, as to her, shall be void" (Rev. St. Ind. 1894, § 6964), it has been held that the married woman's mortgage of her property to secure the debt of her husband is void. Engler v. Acker, 106 Ind. 223, 6 N. E. 342 (1886). The same result has been reached under a statute prohibiting the wife from becoming a surety for her husband either directly or indirectly. Richardson v. Stephens, 122 Ala. 301, 25 South. 39 (1898).

BROWN v. MacGILL et al.

(Court of Appeals of Maryland, 1898. 87 Md. 161, 39 Atl. 613, 39 L. R. A. 806, 67 Am. St. Rep. 334.)

BOYD, J. This is an appeal from a decree of the circuit court of Baltimore city, dismissing the bill of complaint filed by the appellant against Sarah G. McGill, Carroll S. McGill, her husband, and James McEvoy, trustee. The bill alleges that on the 16th day of September, 1895, Sarah G. McGill gave the appellant her note for the sum of $2,000, which she borrowed from him with the understanding and agreement that it should be payable, when demanded, out of her separate estate, whether held in her own name or by the intervention of her trustee, James McEvoy, and that it was her intention and purpose to bind and charge her separate estate with the payment thereof. On the 10th day of September, 1894, which was a day or two before Mrs. McGill, who was the widow of George B. Graham, deceased, was married to Carroll S. McGill, she executed a deed of trust by which she assigned and conveyed to James McEvoy, trustee, all property which she had derived from the estate of George B. Graham, and which she might receive from her daughter, Isabella Brown Graham, in trust, "to collect, receive, and, after making all proper deductions for taxes and other charges thereon, to pay over, the net rents, profits, dividends, interest, and income of all said property, real, personal, and mixed, to her, the said Sarah G. Graham, during her natural life into her own hands, and not to another, whether claiming by her authority or otherwise, for her sole and separate use, and upon her separate receipts, without power of anticipation, and excluding all right or interest in, or power over, the same of any husband she may have, or any liability for his debts, contracts, or engagements." It then provides for the disposition of the property after her death.

It is conceded that the debt was contracted by Mrs. McGill with direct reference to her separate estate, and that it was her intention to charge the same. The testimony on that point is ample, under the decisions of this court, to charge any separate estate she had with this debt, unless there be other reasons for its exemption.

It is contended, and the learned judge below so held, that, by reason of the provisions in the deed of trust above quoted, she had no power to charge or pledge the property held by James McEvoy, trustee. That being her only separate estate, so far as disclosed by the record, we are necessarily called upon to determine the effect of those provisions.

[The court then held that, while restraints on alienation placed upon an equitable life estate by one other than the cestui were valid, even when the cestui was an adult male under no disability, yet such restraints on alienation were invalid when attempted to be created by such adult male in settling his own property on himself.[14] The court continues as follows:]

But, conceding this to be the law as to those who are sui juris, how far does it apply to married women or to a deed made by one in contemplation of marriage? That is the important and most difficult question before us. The doctrine of the separate estate of a married woman was purely a creature of equity, and worked a radical change in the principles of the common law applicable to the marital relation, as affecting the rights of property between husband and wife. In Buckton v. Hay, 11 Ch. Div. 645, the master of the rolls said that "it was considered that to give it to her without restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation"; and in Tullett v. Armstrong, 4 Mylne & C. 377, Lord Chancellor Cottenham said: "The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." And again: "It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation." In other words, the reason that the English courts permitted these restrictions on property of a married woman, although they had denied their validity as against the property of persons sui juris, was that her right to hold property free from her husband's control was created for her by courts of equity, and the chancellors thought she was not sufficiently protected from her husband without this restraint. It was very reluctantly done, and only because it was deemed necessary for the protection of wives from their husbands, as a study of the English cases will show.

What we have said above in regard to these restraints imposed by third persons will, of course, apply to a married woman when she is the recipient of the bounty of another; but we cannot consent to the establishment of a doctrine in this state which will enable a married woman, or a woman in contemplation of marriage, to place her property that would be otherwise responsible for debts contracted with reference to it beyond the reach of her creditors, and still enjoy the use and benefit of it as fully and completely as she had done before. We do not mean to intimate that she cannot so settle her separate property as to place it beyond the control and reach of her husband and his creditors, but when the rights of her creditors are involved, and the property in question be of the character that would be liable to such creditors but for such restraints, she should not be permitted to escape the payment of her just debts by reason of her own declaration that such property should not be liable for her debts, or that the income should be paid to her alone and not to another, notwithstanding it is made a matter of record before the debts are contracted. There is no necessity to establish such a doctrine for her protection against her husband, as, under the laws of this state, she has ample protection against him and his creditors, and we do not "assume that husbands will be constantly endeavoring to wrest their wives' property from them, and devote it to their own uses." Cooke v. Husbands, 11 Md. 505; Olivet v. Whitworth, 82 Md. 262, 33 Atl. 723. Separate estates were created in equity because married women could hold no other. As the husband at common law became the absolute owner of the wife's personal property and of the rents and profits of her real estate during coverture, she was not liable for debts, or, to speak more accurately, she could not contract them. When, therefore, chancellors created an estate that she could hold and dispose of, and which was liable for her debts, if contracted with reference to it, by going a step further, and permitting restraints on alienation and anticipation, they did not place the property in a worse position, so far as the debts of married women were concerned, than it was before the equitable separate estate was created.

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[14] Requa v. Graham, 187 Ill. 67, 58 N. E. 357, 52 L. R. A. 641 (1900), accord.

But, under our laws, a married woman may not only have an equitable separate estate, but by statute she may acquire property by purchase, gift, grant, devise, bequest, descent, in course of distribution, or, as amended in 1892, in any other manner, and, however obtained, it is protected from the debts of her husband. Such property she holds for her separate use, with power of devising it as fully as if she were a feme sole, and she may convey it by joint deed with her husband. It is not necessary for her to have a trustee to secure her the sole and separate use of her property, but, if she desires it, she can appoint one by deed, her husband joining with her, or she can apply to a court of equity, and have one appointed. The husband and wife may jointly charge her statutory separate property in the same way that she could charge her equitable separate estate, even by a parol contract, and courts of equity have the power to enforce the one as well as the other. Wingert v. Gordon, 66 Md. 106, 6 Atl. 581, and cases there cited. She may be sued at law, on a note, bill of exchange, single bill, bond, contract, or agreement, executed jointly with her husband. Property earned by her skill, industry, or personal labor, as well as the income therefrom, is held by her to her sole and separate use, with power as a feme sole to dispose of it, and it is liable for debts incurred by her about such business. In short, the tendency of our legislation is to greatly enlarge both her powers and liabilities, although it carefully protects her property from her husband and his creditors, so that now many of the reasons for decisions rendered in the past century, or the early part of the present one, can no longer have much force under our changed conditions.

This particular question was not passed upon by this court when we still had the conditions to meet that originally influenced the English courts, and as we are now called upon for the first time to decide it, at a time when the policy of the state is so radically different in its dealing with married women from what it formerly was, we do not feel called upon to be governed by reasons no longer applicable, and make an exception in favor of married women, or those in contemplation of marriage, especially as it might result in creating a privileged class, which would not reflect credit upon the law that created it nor the state that fostered it. Property is too easily transferred from husband to wife to permit her to do what he is prohibited from doing, because it is contrary to the policy of the law, calculated to tempt his honesty, and to impose upon and deceive those dealing with him. If the wife is at the mercy of and under the absolute control of the husband, as seemed to be the moving cause of the English courts when they supported the validity of the prohibition against alienation in her favor, then he can with great facility make use of her to do what he himself cannot do, if we hold she can place such restraints on her property. He would only be required to convey the property to her, and let her place such restraints on it as he desired, to make it impregnable against the assault of creditors, although he could not do it himself as long as the property was his own, because he was sui juris. Would not the result of such a decision be that a married man who wanted to have such restraints on his property could convey it to his wife, and thus accomplish indirectly, though his wife, what he could not do directly?

Without meaning to say that the facts and reasoning are in all respects applicable, the Massachusetts and Pennsylvania cases are more in accord with our views of the proper doctrine to establish as the law of this state on this question than the English cases are. See Bank v. Windram, 133 Mass. 175; Jackson v. Von Zedlitz, 136 Mass. 342, and Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135, 11 L. R. A. 565, 23 Am. St. Rep. 215, in which the courts of those states have passed on the general subject, as well as on the proposed exception in favor of married women. In the case of Reid v. Trust Co. [86 Md. 464, 38 Atl. 899], supra, this court, after referring to Brandon v. Robinson, 18 Ves. 434, Buckton v. Hay, 11 Ch. Div. 645, and Tullett v. Armstrong, 4 Mylne & C. 377, to show the views of the English courts, said: "It thus appears that the exception in case of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland this is not the general rule." And then, after quoting from Smith v. Towers [69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398], to show what the law is here, it was said: "In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature." Although this precise question was not involved in that case, we strongly intimated that we differed from the English decisions which applied a different rule in favor of trusts to married women from that applied to other trusts of the same nature, and we are of opinion that the rule which we have above laid down for persons who are sui juris is equally applicable to them. The income from the property in the hands of the trustee is therefore liable in equity to the payment of the debt due the appellant. We have not thought it necessary to advert to the fact that the deed was made when Mrs. McGill was single, as it seems to have been practically conceded that it was made in contemplation of marriage, or that her husband departed this life after the debt was contracted and after this suit was brought.

The decree will be reversed, and the cause remanded, in order that the lower court may pass a decree requiring the trustee to pay out of income now in his hands, or that may hereafter come into his hands, the amount due on the note of Mrs. McGill, together with the costs in this court and the court below. Decree reversed and cause remanded.

PAGE, J., dissenting.

CHAPTER VIII

DEVISES BY MARRIED WOMEN

VAN WINKLE v. SCHOONMAKER.

(Prerogative Court of New Jersey, 1862. 15 N. J. Eq. 384.)

THE ORDINARY. The appeal is from a decree of the Orphans' Court of Bergen county, admitting to probate the will of Mary D. Van Winkle, the wife of the appellant. The will disposes of both the real and personal estate of the testatrix. It is dated on the first of February, 1859, and was offered for probate on the twenty-fourth of March ensuing, and on that day a caveat was filed by the husband against the probate.

It appears, from the evidence, that the scrivener was requested, by the husband of the testatrix, to write the will, and was furnished by him with instructions for that purpose. After the death of the testatrix, a day was fixed for the reading of the will at the house of the husband. Notice was given by him to the heirs of his wife, and the will was read there in his and their presence. He knew of its being taken to the surrogate's office for probate, and made no objection to it.

At the time the will was executed, both the scrivener and the husband of the testatrix supposed that she had a legal right to dispose of her property, real and personal, by will. The mistake was not discovered until the will was taken to the surrogate's office for probate. The fact of the testatrix being a married woman appearing upon the face of the will, the surrogate suggested doubts in regard to its validity. He told the parties, however, that the matter might be arranged, the heirs of the testatrix being of age, by their releasing the devisee the land devised to her under the will. The husband consented to the probate of the will, if the devises, as well as the bequests, could be carried into effect. The heirs refused to consent to the proposed arrangement, and thereupon the husband filed a caveat against the probate. The testatrix and her husband having been married over twenty years, the case stands entirely clear of the operation of the act of 1852 for the better securing the property of married women.

As to the real estate, the will is clearly invalid. A married woman is incapable of devising real estate.[15] 2 Bla. Com. 498; Nix. Dig. 874, § 3.

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[15] It has been held that under a statute providing that "every person lawfully seized and possessed of any real estate in this state, of the age of twenty-one years and upwards, and of sane mind, shall have power to give, devise,

She is also incapable of disposing of her chattels by will without the consent of her husband. Such a will, being a mere nullity, will not be admitted to probate. 3 Bla. Com. 498; 4 Coke's Rep. 51, b; 1 Williams on Executors, 45.

But with the consent of her husband, the wife may make a valid will of her personal estate, or even of the goods of her husband. Such consent may be by parol, may be express or implied. It may be before or after the death of the wife, as if a woman makes a will of the goods of her husband and dieth, and after the probate of the will the husband delivers the goods to the executor, he hath made it a good will, notwithstanding he was not privy to the making thereof. It shall be intended, that by the delivery of the goods by the husband to the executor according to the will, he assented to the making thereof. Perkins on Conveyances, "Devises," c. 8, § 501; 1 Swinb. on Wills, 80, pt. 2, § 9.

In the case now under consideration, the will was made with the knowledge and consent of the husband of the testatrix. His consent was given by implication, both before and after the death of the testatrix.

But it is objected that the consent is inoperative, because it was given by the husband under a mistaken apprehension of his rights. He believed that his wife had a perfect right, under the act of 1852, to dispose of her property without his consent. No consent therefore, it is said, can be implied from his acquiescence. Even his express consent, to be available, must be an intelligent consent. However consonant the objection may seem to our ideas of justice, I do not perceive upon what principle it can rest. As a general rule, it is clear that a party cannot be relieved, even from his contract, by reason of a mistake in law. Here is a mere waiver of his interest in the property bequeathed by the wife. The husband consents that the wife shall dispose of his property, or of her property in which he has an interest. The consent is founded upon no consideration. It is not legally binding. It may be revoked at the husband's pleasure. It is personal to the husband, and no more than a waiver of his rights as her administrator. It can only give validity to her will in case he survives his wife. But how can it be said to be void or inoperative by reason of a mistake of his rights? If no legal rights have been acquired under the consent, it is clearly inoperative. If such rights have been acquired, it is not perceived how they can be lost by reason of an error in law committed by the husband.

It is further objected that the consent is inoperative, because it was a qualified assent—an assent to the will as an entirety, valid in all its parts. This qualification was in terms annexed to the consent made, at the surrogate's office, to the probate of the will. But no

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and dispose of the same, by a will in writing," a married woman had no power to devise her lands. Marston v. Norton, 5 N. H. 205 (1830); Osgood v. Breed, 12 Mass. 525 (1815).

such qualification was annexed, in terms at least, to the original assent made to the will at the time of its execution. If this consent could be regarded as a matter of contract—if, for example, the husband, by an express agreement, consents that the wife shall dispose of her entire estate, by will, provided she bequeaths one half of it for his benefit, or in such mode as he should suggest, the failure to comply with the terms might terminate the consent. But it is not perceived how this doctrine is to operate in case of an implied consent. And if the husband consents that the wife may dispose of all her property by will, that consent cannot be invalid because a part of her property is by law incapable of being disposed of by will. There is in fact no room for the application of either of these objections. The consent is not obligatory, but is revocable at the pleasure of the husband at any time before probate granted. It is nothing more nor less than a consent that the will be admitted to probate. If that is revoked, probate cannot be granted. 2 Swinb. on Wills, 81, pt. 2, § 9; Henley v. Phillips, 2 Atkyns, 49; 1 Roper on Husb. and Wife, 170; 1 Bright on Husb. and Wife, 65; 1 Williams on Ex'rs, 46; 1 Jarman on Wills, 31.

Some of the cases seem to maintain a different doctrine. Brook v. Turner, 2 Mod. 172.

It is reported to have been held by Sir H. Jenner Fust, in Mass v. Sheffield, that if after the death of the wife the husband does assent to a particular will, he is bound by that assent; and as a consequence of that decision, it is stated by elementary writers, that if, after the death of the wife, the husband acts upon the will, or once agrees to it, he is not, it seems, at liberty to retract his assent and oppose the probate. 1 Williams on Ex'rs, 47, and note w; 1 Bright, 65, and note d.

As applied to a particular state of facts, that may be true. If, for instance, the executor, in advance of the probate, with the assent of the husband, dispose of the property bequeathed to third persons, or if rights are otherwise acquired under the will, it may well be that the husband would not be permitted to retract his assent and oppose the probate.

But this will be found not to affect the general principle, that the consent is revocable by the husband at any time before probate.

The decree of the Orphans' Court must be reversed.

LAW AND OPINION IN ENGLAND, by A. V. Dicey, pp. 378, 379: "Equity, whilst conferring upon a married woman the power to dispose of her separate property by will, gave her no testamentary capacity with respect to any property which was not in technical strictness separate property. Take the following case: W was possessed of separate property. By her will made in 1850, she left, without her husband's knowledge, the whole of her property of every description to T. In 1855 H, her husband, died and bequeathed £10,000. to W. W died in 1869, leaving her will unchanged. The property which had been her separate property in 1850 passed to T, but the £10,000. did not pass to T. It would not pass at common law,—it would not pass according to the rules of equity,—for the simple reason that as it came to W after her husband's death, it never was her separate property."

TAYLOR v. MEADS.

(Court of Appeal in Chancery, 1865. 4 De Gex, J. & S. 597.)

See ante, p. 498, for a report of the case.

NAYLOR v. FIELD.

(Supreme Court of New Jersey, 1861. 29 N. J. Law, 287.)

VREDENBURGH, J. The only question in this cause is, whether a will of a woman married before the passage of the act for the better securing the property of married women, passed March 25th, 1852, of lands conveyed to her since the passage of that act passes the legal title.

The act of 1846, (Nix. Dig. 874, § 3,) provides that wills or testaments, made or to be made of any lands by any woman covert, shall not be held or taken to be good or effectual in law.

If this section, therefore, be not repealed, either expressly or by implication, this will cannot be effectual in law.

But it is claimed by the defendants that the act first above recited, of the 25th of March, 1852, does repeal it, not expressly, but by necessary implication.

The third section of the act of 1852, which governs this case, provides that it shall be lawful for any married female to receive by gift or grant, and hold to her sole and separate use as if she were a single female, real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

In order to construe a statute so as to repeal a former statute by implication, the implication must be a necessary one.

It is contended here that the jus disponendi is a necessary incident of all property, and as this statute takes away all property from the husband, and vests whatever rights he had under the old law in the wife, and gives her an absolute present fee, that by necessary implication it repeals the act of 1846.

But, in the first place, it is not universally true that the jus disponendi is an incident of property. It is and always has been suspended in the cases of infants and lunatics, and until the passage of the act in question, as to feme coverts.

In the next place, it is apparent that the clause in question was not intended to remove any disability the wife was under to dispose of her property; it was only intended to give her a property in the land, which would otherwise, by the conveyance to her, ipso facto vest in the husband, to wit, the estate, during their joint lives.

It was this joint estate, and no other, the act was intended to affect. The act intended that, as before its passage, a married woman could not receive by grant any land as a married woman without its vesting ipso facto during their joint lives in the husband, she should, by the act, be enabled to receive it otherwise, that is, she should be able to receive it not as a married woman, but as a feme sole, so that it should not ipso facto, by the reception, vest in the husband; but the act had to go further, for if it had stopped with the word "receive," although she might receive it as a feme sole, yet the very next instant after she received it, it would vest in the husband by virtue of the marriage relation as if she had got it before marriage. So it was necessary for the act to go further, and it adds accordingly, that it shall not only be lawful for her to receive it as a feme sole, but that she shall hold it as a feme sole. This was necessary, because from the instant that she ceased to hold it as a feme sole, she would hold it as a married woman, and a joint estate thus vest in the husband, and subject it to his control and debts. To prevent this was the sole object of the words "receive and hold." But this power to receive and hold under the act is limited to the continuance of the marriage in its express terms. It is only a married woman can so hold. As soon as the marriage relation ceases the act has no object on which it can operate. The property, upon the death of either husband or wife, is instantly as if the act had never been passed.

It is contended that the word "hold," in the act, meant that the wife should hold as in a pure fee simple; but it is apparent that the word "hold" was not intended to be used by the act in that sense, but simply to prevent the estate, at each instant during the marriage, becoming the joint estate of husband and wife. It was absolutely necessary to use that word to prevent the title at each instant lapsing into a joint estate.

It is impossible to construe the word as the defendants would without altering the relationship of husband and wife; much more, then, it is apparent the legislature intended the great and only object of the act was to prevent the joint estate and to free the land from the debts and control of the husband during coverture. But it did not intend to affect the marriage relation, strictly so speaking, at all.

The words "receive and hold" were only intended to indicate the character in which she held the property in its relation to the debts and control of the husband, but not to disturb the marriage relation in any other respects. She still is wife, and he husband. He is, as yet, entitled to live in her house, to eat at her table, and to sleep in her bed. She cannot, therefore, hold literally as a feme sole. She cannot bring an action of ejectment, and thus pass against him a decree of divorce a mensa et thoro. All the relations, privileges, and disabilities of husband and wife still exist, save only that the mere fact of marriage does not vest in him a joint estate. This court decided in Ross v. Adams, 28 N. J. Law, 160, that notwithstanding this act the husband, at the death of the wife, was entitled to his curtesy.

It is true that in the State of New York it has been decided (Billings v. Baker, 28 Barb. 343) that the husband has no curtesy; but in that state the statute, in express terms, gives the wife the jus disponendi.

What necessary implication is there that the act of 1852 repeals quo ad hoc the act of 1846? Before the act of 1852, the wife owned the fee simple subject only to the curtesy and the joint estate, yet she was expressly deprived of the jus disponendi. The act of 1852 only gives her the additional estate during the marriage. Why would she have the jus disponendi any the more because the act disenables the estate to pass to the husband?

Acts of similar import have been passed in several of the other states; but I have been unable to find a single case where it has been construed to carry with it the jus disponendi without an express provision to that effect. Our act is a copy of that of the State of New York, so far as it goes, but refuses to follow it, so far as regards the power to convey or devise.

I am satisfied that the whole object and intent of the words "receive and hold" was merely to prevent the estate during coverture from lapsing into a joint estate, and not otherwise to affect the marriage relation or give any power to convey or devise, and that the mere disenabling the estate from passing through the wife to the husband and wife during marriage was not intended to give, and did not necessarily give her the jus disponendi.[16]

OGDEN, J., concurred.

In re TULLER'S WILL.

(Supreme Court of Illinois, 1875. 79 Ill. 99, 22 Am. Rep. 164.)

Mr. Justice SHELDON delivered the opinion of the Court:

This is an appeal by Lydia A. Cole, residuary devisee and legatee under the will of Esther R. Tuller, deceased, from the order and judgment of the circuit court of Peoria county, refusing to admit said will to probate, such order and judgment having been made on appeal in reversal of an order of the county court admitting the will to probate.

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[16] Separate concurring opinion of Chief Justice Whelpley omitted.

The facts are, that Esther R. Tuller, on the 20th day of May, 1869, made and published her will, she being then a widow, and having at the time, living, three children by a former marriage, all of whom are still in full life.

Afterwards, on the 2d of September, 1869, the testatrix was married to one Marcus Hosmer, from whom she was, on the 16th day of December, 1873, divorced by decree of the circuit court of Peoria county, upon bill filed by her for that purpose. The testatrix died on the 6th of March, 1874, having made no other will, and having had no child by said Hosmer.

The question presented for consideration is, whether there was a revocation of the will by the marriage with Hosmer.

It is the old and well settled rule of the common law that the will of a feme sole is revoked by her subsequent marriage; and it is contended that, under this rule, the will was revoked. The reason of the rule was, that a will is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure; that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control; and that it is against the nature of a will to be absolute during the testator's life; it is therefore revoked, in judgment of law, by such marriage. 4 Kent's Comm. 527; 2 Greenl. Ev. § 684.

That reason does not exist under our present statute of 1872, which gives to every female of the age of 18 years, the power to devise her property by will or testament.

Did it exist under the Statute of Wills of 1845, in force up to 1872?

The 1st section of the Statute of Wills of 1845 provides as follows: "Every person aged 21 years, if a male, or 18 years, if a female, or upwards, and not married, being of sound mind and memory, shall have power to devise all the estate * * * which he or she hath, or at the time of his or her death shall have, in and to any lands, etc. All persons of the age of 17 years, and of sound mind and memory, married women excepted, shall have power to dispose of their personal estate by will or testament; and married women shall have power to dispose of their separate estate, both real and personal, by will or testament, in the same manner as other persons."

The Statute draws a manifest distinction between the property generally of married women, and their separate property, giving power to dispose of the latter by will, but not of the former. The strict rules of the old common law, as is well known, would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. But courts of equity have admitted the doctrine that a married woman is capable of taking real and personal estate to her own separate and exclusive use; and whenever real or personal property is given or devised or settled upon a married woman for her separate and exclusive use, her interest will be protected in equity against the marital rights and claims of her husband and of his creditors. The separate estate of a married woman was a creature of equity at the time of the passage of the statute of 1845.

By the statute of 1861, entitled "An act to protect married women in their separate property," all the property of a married woman is made her sole and separate property, and is thereby made as fully her separate estate as any separate estate which she could in any way have had at the date of the passage of the act of 1845 and after, except that the statute of 1861 gives no power of disposing of her estate. Such being the case, then, that, under the statute of 1861, all of the property of a married woman is made her separate estate, we know no sufficient reason why, since the act of 1861, the statute of 1845, giving to married women the power to dispose of their separate estate by will, should not have operative effect in respect to all of a married woman's property, and be construed as enabling her to dispose of all her property by will in the same manner as other persons. The reason, then, for holding the will of a feme sole to be revoked by marriage, would no longer exist, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control.

The further reason given, that the marriage of a feme sole is such an entire change in her condition and relations that it is generally held to work a revocation of her will, (1 Redfield on Wills, 292,) equally fails, as, since the act of 1861, her marriage works no essential change in her conditions and relations as respects her property. We are of opinion, then, that, since the act of 1861, the will of a feme sole is not revoked by marriage, the reason of the rule no longer existing. Her will, then, in this respect, must be regarded as standing upon the same footing with the will of a man.

[The Court then held that there was no revocation of the will by reason of the application of any general rule of revocation from circumstances applicable to the will of an adult male under no disability.]

Judgment reversed.

EMMERT v. HAYS.

(Supreme Court of Illinois, 1878. 89 Ill. 11.)

Mr. Chief Justice Craig delivered the opinion of the Court:

The principal question presented by this record is, whether Rebecca Stallings, on the 7th day of December, 1870, had power, under the laws of the State, to dispose of real estate by will, and in order to get a clear understanding of the question, a brief reference to the facts is necessary.

It appears, from the record, that Rebecca Stallings was married to William Stallings on the 16th day of January, 1860; that at the time of her marriage she owned the real estate in controversy in fee; that she acquired the title by inheritance from her deceased father, George

L. Hays, prior to the marriage; that on the 7th day of December, 1870, in due form of law, she executed her last will and testament. At this time, however, she was the wife of William Stallings, but at the May term, A. D. 1871, of the circuit court of Madison county she obtained a divorce from her husband, on the ground of extreme and repeated cruelty towards her. It also appears, that on the 19th day of January, 1872, Rebecca Stallings departed this life, seized of the lands in question; that on the 24th day of February, 1872, her will was admitted to probate by the county court of Madison county. After the will was admitted to probate, the devisee under the will took possession of the lands as owner thereof, and this bill was filed by the legal heirs of the testatrix to set aside the will and probate thereof, as a cloud upon their title as heirs to the lands attempted to be devised.

The position assumed by the complainants in the bill is that the lands in question were not the "separate estate" of the testatrix, as that term is known in law, and as the testatrix was, at the time of the execution of the will, under the disability of coverture, the instrument purporting to be a will was inoperative and void.

The first section of chapter 109, of the Revised Statutes of 1845, entitled "Wills," which was in force when this will was executed, declares: "Every person aged twenty-one years, if a male, or eighteen years if a female, or upwards, and not married, being of sound mind and memory, shall have power to devise all the estate, right, title and interest in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents charged upon or issuing out of them, or goods and chattels, and personal estate of every description whatsoever, by will or testament. All persons of the age of seventeen years, and of sound mind and memory, married women excepted, shall have power to dispose of their personal estate by will or testament, and married women shall have power to dispose of their separate estate, both real and personal, by will or testament, in the same manner as other persons."

This statute confers express power on a married woman to devise her separate estate.

The lands involved in this litigation were inherited by the testatrix from her father. She acquired the absolute title by descent. Her husband never had any interest in the lands except such as he acquired by the marriage, and that interest, whatever it was, became divested and destroyed by the decree of divorce obtained by the testatrix for the misconduct of the husband.

The important inquiry then is, whether these lands are to be regarded as the separated estate of the testatrix within the meaning of the section of the statute quoted supra.

In deciding this question, a subsequent statute, approved February 21, 1861, as we conceive, has an important bearing. It declares: "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her, the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

At common law the wife was not permitted to take and enjoy real or personal property separate from or independent of her husband. 2 Story, Eq. Jur. § 1373. But, notwithstanding the rule of the common law in this regard, where property, either real or personal, was given, devised or settled upon a woman, for her sole, separate or exclusive use, either before or after marriage, courts of equity have uniformly protected the wife in the sole use and enjoyment of such property, free from the marital rights of the husband or the claims of his creditors. Where a separate estate has been created, whether the husband shall be barred of the interest which the common law gave him in the property of the wife, depended upon the intention of the donor in creating the separate estate; but as has been said in Clancy's Rights of Married Women, 251, when that intention is once ascertained to be, that the use is for the wife alone, and not for her husband, equity will give effect to it, without any regard to the legal maxim that "the husband is the head of the wife, and therefore all that she has belongs to him." The separate estate could be created by deed, devise or marriage articles, and when created its character and use and object were marked out and defined by the instrument by which it was established. The intervention of trustees was not regarded as indispensable. Story, § 1380.

A separate estate created as here indicated, it is contended by the complainants in the bill, is the only separate estate which a married woman can dispose of by will, under the statute of 1845. Whether that position could be maintained had the act of 1861 never been passed, it is not necessary to determine. The rules providing for and regulating the descent of property have their origin in municipal regulation. So, too, the power to dispose of property by will is conferred by statute in the several States. That power may be curtailed or enlarged, from time to time, as the wisdom of the legislative department of the government may think wise and for the best interests of the people.

Under the act of 1845, a married woman had the power conferred upon her of disposing, by will, of her separate estate. If, at the time of the passage of that act, a separate estate was confined to such property as had been conveyed to trustees for a definite purpose, or such an estate as was created in a particular manner, and protected and sustained by courts of equity until such time as the legislature should, by proper enactment, enlarge the meaning of the term "separate estate," a married woman would be powerless to devise any property by her owned which would not fall within the known and recognized definition of "separate estates." But should the legislature, at any time, so enlarge the meaning of the term "separate estate," as that it would embrace lands conveyed directly to a married woman, or such as should come to her by title of fee simple by the statute of descents, or such as she should, during coverture, purchase, no reason is perceived why such property could not then be devised by her with the same validity as the other property which was technically known as her separate estate. Now, as we understand the act of 1861, it enlarged the meaning of the term separate estate, and made it embrace such property as a married woman owned at the time of marriage, or such as she should acquire during coverture, in good faith, from any person other than her husband, by devise, descent or otherwise. In other words, a legal separate estate was created, which could be devised by a married woman in the same manner and with like effect as an equitable separate estate. It was not the purpose of the act of 1861 to curtail or circumscribe the powers and rights of married women, but to enlarge them, and we apprehend that if the legislature had entertained a doubt in regard to the power of a married woman to devise lands, under the act of 1845, which she had inherited or acquired by purchase, a provision would have been inserted in the act directly conferring the power. Since the passage of the act of 1861, property purchased by a married woman during coverture, or property inherited by her before or since the act became a law, when spoken of by the court, has been regarded and recognized as her separate estate.[17]

[Balance of opinion omitted.]

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[17] Observe, however, that where the married woman receives property from her husband not settled to her separate use, so as to create a separate estate in equity, some statutes, like the Illinois married woman's act of 1861, expressly exclude it from being a separate estate at law. Hence there could be no power to devise it. Thompson v. Minnich, 227 Ill. 430, 438, 81 N. E. 336 (1907); Zeust v. Staffan, 14 App. D. C. 200 (1899).

CHAPTER IX

SPECIFIC PERFORMANCE OF THE WIFE'S AGREEMENT TO CONVEY, AND THE REFORM OF THE WIFE'S DEED

O'RIELLY v. KLUENDER.

(Supreme Court of Missouri, 1906. 193 Mo. 576, 91 S. W. 1033.)

Petition for specific performance by the assignee of Aime D. Garnier and his wife, Maria, against the heirs of Maria Kluender, who with her husband entered into a contract with Aime D. Garnier and his wife to make such conveyances as might be necessary to convey their interests to any purchaser which the said Maria Garnier shall find for land in which Mrs. Garnier had an estate for life with a remainder to Mrs. Kluender. The petitioner stood in the position of such purchaser from Mrs. Garnier and her husband. Judgment for the defendants in the trial court. The plaintiffs appealed.

Marshall, J.[1] [after stating the facts, said:]

I. At the outset the validity of the contract here sought to be specifically enforced presents itself for adjudication. Upon the death of Mrs. Echivard her undivided interest in the land passed, under her will, to her daughter, Mrs. Garnier, for life, with remainder in fee to her other daughter, Mrs. Kluender. Both were married women at that time. The estate thus devised was a pure legal estate, and not a separate equitable estate. At the date of the contract set out, on the 3d of December, 1873, between Mr. and Mrs. Garnier and Mr. and Mrs. Kluender, Mrs. Garnier and Mrs. Kluender were both under coverture. Without analyzing the true meaning of that contract or stopping to consider whether or not it was based upon a valuable consideration, moving to Mrs. Kluender, and treating the contract as otherwise a valid contract, the question here is whether it was binding upon Mrs. Kluender, by reason of the fact that she was at that time under coverture, and that it related to an estate the legal title to which was in her, and acquired by her between 1866 and 1889. One of the essential elements to the validity of every contract is that it is made by persons competent to contract. The general rule of law is that where one of the parties to a contract is unable, because of coverture, to complete a transaction, the contract is invalid and unenforceable, either at law or in equity. 21 Am. & Eng. Ency. Law (2d Ed.) p. 925.

The rule has long obtained in this state that, prior to 1889, a contract made by a woman under coverture with respect to her mere legal estate is void, and cannot be enforced either at law or in equity.

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[1] Statement abridged.

Gwin v. Smurr, 101 Mo., loc. cit. 552, 14 S. W. 731, was a bill for the specific performance of an alleged contract for the conveyance of land held by a wife, in fee, and other relief. The trial court dismissed the bill, and, upon appeal, the judgment was affirmed by this court. Sherwood, J., speaking for the court, said: "The title of the wife was under the married woman's act (Rev. St. 1879, § 3295),[2] having been derived after 1866, and there being no words employed either in her father's will, or in the decree of partition, which created in her an equitable, separate estate. In consequence of which, her executory contract to convey the land, though executed and acknowledged jointly with her husband, was wholly worthless; as a court of equity would not compel specific performance of such an instrument. State v. Clay, 100 Mo. 571, 13 S. W. 827. The only way the land of the wife held by the tenure of the act aforesaid can be charged, affected or conveyed, is by the joint deed of the husband and wife. Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, and cases cited. The court did right, therefore, in dismissing the petition when the above facts appeared in evidence; because in contemplation of law, there was no contract in existence on which to base a decree for specific performance." There is no difference between that case and the case at bar.

[The court then reviewed at length Warren v. Costello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669, and Brown v. Dressler, 125 Mo. 589, 29 S. W. 13, and continued as follows:]

The statute in force at the date of the execution of the contract here sought to be enforced was section 2, p. 44, of the General Statutes of 1865, which was as follows: "A husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband by their joint deed acknowledged and certified as herein provided; but no covenant expressed or implied in such deed shall bind the wife or the heirs, except so far as may be necessary effectually to convey from her and her heirs, all her right, title and interest expressed to be conveyed therein."

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[2] This statute is in the following words: "The rents, issues and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution, for the sole debts of her husband; and no conveyance made during coverture by such husband of such rents, issues and products, or of any interest in such real estate, shall be valid, unless the same be by deed executed by the wife jointly with the husband, and acknowledged by her in the manner now provided by law in the case of the conveyance by husband and wife of the real estate of the wife: Provided, such annual products may be attached or levied upon for any debt or liability of her husband, created for necessaries for the wife and family, and for debts for labor or materials furnished upon, or for the cultivation or improvement of such real estate." Rev. St. Mo. 1879, § 3295.

Though the instrument here sought to be enforced was in writing and executed and acknowledged by the married woman and her husband, nevertheless, it was not a deed, but was simply an executory contract, and as such was absolutely void as to the married woman and was not binding upon her or her heirs, and cannot be enforced in either a court of law or a court of equity. The distinction between the power of a married woman to contract with reference to her legal estate before and after the married woman's act of 1889, was further pointed out by this court in McReynolds v. Grubb, 150 Mo., loc. cit. 363, 51 S. W. 822, 73 Am. St. Rep. 448; and Clay v. Mayer, 183 Mo., loc. cit. 156, 81 S. W. 1066.

It follows that the contract here sought to be specifically enforced was void as to Mrs. Kluender and as to her heirs.

This conclusion makes it unnecessary to consider the other points so learnedly discussed by counsel.

The judgment of the circuit court was right, and is affirmed. All concur.[3]

KINGSLEY v. GILMAN.

(Supreme Court of Minnesota, 1870. 15 Minn. 59 [Gil. 40].)

BERRY, J. On the 12th day of September, 1865, Remembrance R. Gilman, being the owner of two acres of land which she acquired by grant after her marriage, executed together with her husband, Francis Gilman, a certain bond conditioned for the conveyance of the same to the plaintiff. This action is brought to enforce specific performance of the condition. The court below find that the bond was insufficiently acknowledged by the said Remembrance, and that it is therefore void. All the other facts material to the plaintiff's recovery are found in his favor. We are of opinion that the bond was valid and binding upon the obligors without any acknowledgment. By section 106, p. 571, Pub. St., it was provided that "any real or personal estate which may have been acquired by any female before her marriage, * * * or to which she may at any time after her marriage be entitled, by * * * grant, * * * shall be and continue the real and personal estate of such female after marriage, to the same extent as before marriage: * * * provided, that nothing in this section contained shall be construed to authorize any married woman to give, grant, or sell any such real or personal property without the consent of her husband, except by order of the district court of the county. * * *" The language, "to the same extent as before marriage," must mean "to the same extent as if she were sole." A feme sole owning land in fee simple, has the right, by virtue of, and as one of the attributes of ownership, to grant and convey it or to contract to do so; and if upon becoming a feme covert she has not the right to grant and convey it, or to contract to do so, then she is not owner to the same extent as if she were a feme sole; her ownership is not so absolute, nor so extensive, and does not embrace so many rights as if she were sole. We are of opinion, then, that under the section cited, a married woman has the right with the consent of her husband to contract to convey her real property. And it is perhaps hardly necessary to add that as she has the right to contract, she has the right to make a valid, binding and effectual contract, so that the contractee upon fulfilling upon his part can enforce specific performance. Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, and 22 N. Y. 450, 78 Am. Dec. 216; Carpenter v. Leonard, 5 Minn. 155 (Gil. 119); Pond v. Carpenter, 12 Minn. 430 (Gil. 315); Williams v. McGrade, 13 Minn. 52 (Gil. 39).

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[3] Felkner v. Tighe, 39 Ark. 357 (1882); Chrisman v. Partee, 38 Ark. 31 (1881).

The only condition which the statute cited imposes upon the exercise of her right to make such contract is that it shall not be done without the consent of her husband. The consent was given in this case, for her husband joined with her in the execution of the bond. But it is urged, and was held by the court below, that this case is governed by section 12, c. 35, p. 398, Pub. St., which reads as follows: "When any married woman residing in this territory, shall join with her husband in a deed of conveyance of real estate, situate within this territory, the acknowledgment of the wife shall be taken separately, apart from her husband, and she shall acknowledge that she executed such deed freely and without any fear or compulsion from any one." The court below treat the bond in question as a "conveyance" of real estate. But by section 30, c. 35, Pub. St., the word "conveyance" as used in that chapter, is expressly defined as not embracing "executory contracts for the sale or purchase of lands," the bond in this case is certainly a contract of that character. Neither would the words "deed of conveyance of real estate," in Sec. 12, above cited, include bonds of this kind according to any ordinary or authorized use of language. Section 68, c. 35, Pub. St., as will be seen at a glance, does not render acknowledgment essential to the validity of bonds of this kind. At the time then when this bond was executed, there was, so far as we discover, no statute requiring a married woman to acknowledge her bond or contract to convey her real estate in order to make the same binding upon her, so as to support an action for specific performance. From these considerations it follows that the judgment rendered in favor of the defendants was erroneous, and the plaintiff is entitled to have the condition of the bond specifically performed.

It must be admitted that the policy of conferring upon a married woman authority to make a binding contract to convey her real estate without requiring her to acknowledge the execution of the same, a contract which she can be compelled to perform, is not easy to be reconciled with the policy which requires her, when she joins with her husband in a deed of conveyance of real estate, to acknowledge, separately, apart from her husband, that she executed such deed freely and without any fear or compulsion from any one. But in view of recent legislation in reference to the rights and powers of femes covert, it is perhaps unnecessary to regard the distinction made as of special importance.

Judgment reversed.[4]

MOULTON v. HURD.

(Supreme Court of Illinois, 1858. 20 Ill. 137, 71 Am. Dec. 257.)

Bill to foreclose a mortgage executed by a wife and her husband, purporting to convey the land of which the wife was seized in fee to secure the note of the husband and to reform the mortgage. The other facts are sufficiently stated in the opinion of the court. There was a decree for the reformation of the mortgage and its foreclosure. The mortgagor brought writ of error.

WALKER, J. This was a bill in equity, filed in the Cook circuit court, by Hurd, to reform and foreclose a mortgage executed by Moulton and wife on real estate of the wife, to secure the payment of four promissory notes executed by Moulton to Hurd, for $852.46 each, with six per cent. interest from date, payable in one, two, three and four years, and dated on the 27th day of October, 1853. The mortgage contained a condition, that if Moulton and wife should well and truly pay, or cause to be paid, to Hurd, said sums of money, with interest, in the manner specified in the notes, then and in that case the mortgage to be void. It also contained a further proviso that "it was understood, that in case any one or more of the above payments of principal or interest, at the time or times the same are above specified to be paid, the whole sum and interest above mentioned shall become due and payable, this mortgage being for purchase." The bill alleges that the words "of failure to pay" should have been, according to the understanding of the parties, inserted in the last named covenant, after the words "in case," and before the words "any one or more," but that, owing to inadvertence and mistake, they were omitted. The bill alleges that the first note had fallen due, and that it, together with the interest on the others, remained unpaid. And prayed that the mortgage be reformed and foreclosed for the amount of all the notes and interest. The defendants, as required by the bill, answered under oath, and denied that any mistake had occurred in executing the mortgage, and that the words, "of failure to pay," were not by mistake and inadvertence omitted to be inserted in the mortgage, as charged in the bill. To this answer a replication was filed. The complainant subsequently filed a supplemental bill substantially the same as the original bill, but alleging that the second note had fallen due and was unpaid, and the prayer was the same as in the original bill. To the supplemental bill defendants demurred, which the court overruled. The supplemental bill was taken as confessed, and the court decreed a foreclosure of the mortgage, for the amount due on the four notes.

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[4] See, also, Baker v. Hathaway, 5 Allen (Mass.) 103 (1862).

This record presents the question whether a court of equity has the power to reform the deed of a married woman.

At the common law, a feme covert could not, by uniting with her husband in any deed of conveyance, bar herself or her heirs of any estate of which she was seized in her own right, or of her right of dower in the real estate of her husband. The only mode in which a married woman could, at common law, convey her real estate, or bar her right of dower, was by uniting with her husband in levying a fine. This was a solemn proceeding of record in open court, and the judges were supposed to watch over and protect the wife's rights, and ascertain by a private examination that her participation in the act was voluntary and unconstrained. This is the principle upon which the efficacy of a fine is placed by most of the authorities. 3 Cruise, Dig. 153, tit. 35, c. 10.

Acting upon the principle that the participation of the wife in the transfer of her real estate must be free and unconstrained, the courts have held that an agreement made by a feme covert, with the assent of her husband, to sell her real estate, is absolutely void at common law, and that such a contract could not be enforced in equity. And that the whole system of the common law is opposed to the enforcement of the contracts of married women for the sale of their real estate. And that it is a fundamental principle of the common law, that such contracts are void, except when she conveys her estate by a fine duly acknowledged, or by some matter of record. 5 Conn. 492.

Our conveyance acts have, however, changed the mode by which a married woman may convey her real estate. It enables her to do so, by joining with her husband in a deed for that purpose. And which, to be effectual, must be acknowledged before one of the officers of the law authorized to take such acknowledgment. To give it validity, he must examine her separate and apart from her husband, after having explained to her the contents and effect of such deed whether she executes it freely and voluntarily, without the coercion of her husband. Rev. St. 1845, c. 106, § 17.

This provision of our statute, it will be observed, is an enlargement, and not a restriction, of the common law powers of a feme covert. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same force and effect of a fine; but if not acknowledged in accordance with the statute, no estate passes. The statute must be complied with, and if it is not, the deed is left, as at common law, absolutely void. Lane v. Soulard, 15 Ill. 123.

In New York and Ohio, where they have statutes similar to ours, their courts have repeatedly refused to enforce the contracts of married women for the conveyance of their real estate, and also to rectify and reform mistakes in deeds made by them for a conveyance of their lands; upon the ground that their deeds, to be effectual, must be acknowledged freely and voluntarily, and in the mode prescribed by the statute. Knowles v. McCamley et al., 10 Paige (N. Y.) 342; Martin v. Dwelly, 6 Wend. (N. Y.) 10, 21 Am. Dec. 245; Carr v. Williams et al., 10 Ohio, 305, 36 Am. Dec. 87; Purcell v. Goshorn et al., 17 Ohio, 105, 49 Am. Dec. 448.

By reforming the mortgage it was essentially changed. As it was executed, and acknowledged, the complainant could only foreclose for the amount of each note as they severally became due, while, by that instrument as reformed, he could foreclose for the whole amount of the notes, upon default in the payment of either of them. This was to change the deed most materially, and to make it altogether a different instrument from the one executed by the wife of Moulton, and against her consent, and against the intention and understanding of the parties at the time the mortgage was made, if her sworn answer is to have any weight—and it stands uncontradicted by any evidence. This would be to make a deed for the wife against her consent. This the court has no power to do; even the legislature could not give it effect, unless she acknowledged it freely and voluntarily in the mode prescribed by the statute. Lane v. Soulard, 15 Ill. 123.

The court below erred in reforming this deed, and in foreclosing the mortgage for more than the first and second notes, the others not being then due. The decree of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.[5]

HAMAR v. MEDSKER.

(Supreme Court of Indiana, 1878. 60 Ind. 413.)

WORDEN, J. This was an action by the appellant, against the appellees, who were the children and heirs at law of Mary J. Medsker, deceased, and against Jacob Medsker, the surviving husband of the deceased.

The complaint alleged, in substance, that, on the 19th day of August, 1871, said Mary J. Medsker, now deceased, was the owner, in her own right, of certain real estate situate in the county of Hamilton, and State of Indiana, being forty acres, more or less, which is fully described by metes and bounds; that on that day the plaintiff purchased the same of her for the sum of one thousand six hundred dollars, in hand paid to said Mary J., and on the same day, in pursuance of his purchase, took possession of the land; that, on the same day, the said Mary J. Medsker, together with her husband, Jacob Medsker, in order to convey to the plaintiff the land so purchased by him, executed a conveyance to him, duly signed, sealed and acknowledged by said Mary J. and her said husband; that, by mistake of the draftsman who wrote the deed, the description of the land therein was defective, in this, that, after the words "commencing eighty rods west," the words "of south-east corner of the south-east quarter" were omitted, and that in consequence the starting-point, in describing the metes and bounds of said tract of land, was inaccurately stated; that the tract of land herein first described is the identical tract of land intended to be conveyed by said deed at the time of the execution thereof by all the parties thereto, being the same tract that he purchased, paid for and took possession of as before stated; that the plaintiff put his deed upon record, and did not discover the defect in the description until after the death of said Mary J.

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[5] A fortiori, where the married woman's conveyance failed because some statutory formality was not complied with, there could be no rectification of the deed to supply the formality lacking. Brown v. Pechman, 53 S. C. 1, 30 S. E. 586 (1898).

Prayer for a reformation of the deed and the correction of the mistake.

Jacob Medsker, the husband of the deceased, made default, and as to him no question arises in the record.

A guardian ad litem was appointed for the other defendants, who were the minor heirs of the deceased, and on their behalf he filed a demurrer to the complaint, for want of sufficient facts. The demurrer was sustained and final judgment rendered in favor of the demurring parties. Exception and appeal.

It is within the general jurisdiction of a court of equity to grant relief by reforming written instruments, and correcting mistakes therein; and the relief is afforded perhaps more frequently in cases of mistake in the description of land intended to be conveyed, than in any other class of cases.

We have no brief for the appellees, and are, therefore, not advised in what particular the complaint was supposed to be defective. We see no objection to the complaint, however, if the alleged mistake can be corrected, and the deed reformed, as against a married woman, or, in case of her death, against her heirs. We infer that the demurrer was sustained on the ground, that, in the opinion of the court below, the mistake could not be corrected as against a married woman, and therefore could not, as against her heirs.

We have the following statutory provision, viz.:

"No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: Provided, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." 1 Rev. St. 1876, p. 550, § 5.

This provision has been so far modified, by another statute, as that a seal is dispensed with in instruments executed by husband and wife, as in other cases. The American Insurance Co. v. Avery, 60 Ind. 566.

Doubtless the lands of a married woman can be conveyed or encumbered in no other mode than that prescribed by the statute; and her agreements in relation thereto, not executed in the manner prescribed by the statute, are void. Baxter v. Bodkin, 25 Ind. 172; Stevens v. Parish, 29 Ind. 260, 95 Am. Dec. 636; Shumaker v. Johnson, 35 Ind. 33; Behler v. Weyburn, 59 Ind. 143; The American Insurance Co. v. Avery, supra; Glidden v. Strupler, 52 Pa. 400; Dickinson v. Glenney, 27 Conn. 104.

Where a married woman has attempted to convey her estate, but the conveyance is defective for want of compliance with the requisites of the statute, a court of equity will not lend its aid.

In such case, the court will not require her to make a conveyance in accordance with the requirements of the statute, as this would not only contravene the policy of the law, but it would be requiring her to make such a contract as she herself has not made.

Nor is there, in such case, any valid contract that can be enforced by way of specific performance, because the feme covert is incapable in law of making such contract except in the manner prescribed by the statute. Dickinson v. Glenney, supra.

But where, as in this case, a married woman has sold her land and received the purchase-money, and has executed a deed intended to convey the same, in conjunction with her husband, in all respects in accordance with the statute, and perfect except in the description of the land sold and intended to be conveyed, we think the mistake in the description may be corrected as against her, and, of course, as against her heirs.

If such mistake could not be corrected, gross wrong and injustice would result. It is scarcely necessary to say that it would be grossly unjust for her to retain the purchase-money and also the land.

By the reformation of the deed and the correction of the mistake, the object and policy of the statute are not contravened or thwarted. A deed had been executed by the wife, in conjunction with her husband, for the land intended to be conveyed. This satisfies the requirements of the statute, and the title of the purchaser ought not to be defeated by the mistake in the description of the land intended to be thereby conveyed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.[6]

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[6] In Styers v. Robbins, 76 Ind. 547, at page 548 (1881), Elliott, C. J., said: "The case in hand presents, however, a question of controlling importance which was not presented in the case to which we have referred. It was held by the court below that a mistake in the description in the deed of a married

SNELL et al. v. SNELL et al.

(Supreme Court of Illinois, 1888. 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526.)

Mr. Justice MULKEY delivered the opinion of the Court:

On the twenty-sixth day of January, 1881, Philip Snell was the owner in fee of the land in controversy, and resided thereon, with his family, as a homestead. On that day he mortgaged the same to Jane Snell, to secure an indebtedness of $1,839.87, his wife, Ellen J. Snell, joining in the deed. The land lay in section 27, but by mistake it

woman can not be corrected. Since the judgment of the trial court was pronounced this court has decided the reverse, and it is, therefore, the rule in this State, that a mistake in the description of property contained in a deed executed by a married woman may be corrected. Hamar v. Medsker, 60 Ind. 413 (1878); Carper v. Munger, 62 Ind. 481 (1878); Wilson v. Stewart, 63 Ind. 294 (1878). We are aware that these cases have been disapproved by courts of respectability, but we have seen no argument urged against them of sufficient force to induce us to depart from the rule of stare decisis. We are, upon the contrary, satisfied that the rule declared is a sound one, having its foundation in reason and principle. Reforming a mistake in a written instrument, so as to make it operate upon the property the parties intend it should operate, creates no new contract, nor does it even add additional obligations. It simply puts in the instrument what, in legal effect. was already there, the true description of the property. The instrument is only the evidence of the contract, it is not the contract; and reforming the evidence so as to make it accurately and truly describe the property is not making an executed contract out of an executory one. If the parties intended by their deed to evidence the conveyance of a certain parcel of land, and by mistake of the scrivener the deed is made to describe another, the court in making the correction does no more than place in the deed what in law, in equity, and in good conscience should be there, the description of the property intended to be conveyed. In causing the true description to be written in the deed, the court neither makes a new conveyance, nor alters an old one, it simply makes the conveyance effective by applying it to the property sold by one party and bought by the other. A doctrine which denies the authority of the courts to do this, however strongly supported, so far as mere numbers go, by adjudicated cases, does not commend itself to our sense of right and justice, and we cannot give it our approval. We prefer the doctrine that, if a deed untruly describes the property, courts may so reform it as to make it give a true description. In all cases where the deed is one which the parties had capacity to make, there should be power in the court to make it operate upon the proper property, and the fact that one of the grantors is a feme covert should not be allowed to lead to a denial of this power."

The result in the principal case was reached under the Illinois act of 1869 (Laws 1869, p. 359; Laws 1872, p. 282, § 18), which reads as follows: "That any femme covert, being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney or other writing of or relating to the sale, conveyance or other disposition of lands or real estate, as aforesaid, shall be bound and concluded by the same, in respect to her right, title, claim, interest or dower in such estate, as if she were sole and of full age as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing, may be the same as if she were sole." Edwards v. Schoeneman, 104 Ill. 278, 284 (1882).

But observe that under the Illinois act of 1869, supra, there could still be no reform of a deed so far as the married woman was concerned when she joined in it only for the purpose of releasing dower in her husband's property. Knox v. Brady, 74 Ill. 476 (1874).

was described as in section 20. The mortgage contained a proper and formal release of the homestead, and was in every respect strictly accurate, except the error as to the number of the section. On the ninth day of February, 1884, Snell and wife executed to the Northwestern Mutual Life Insurance Company another mortgage upon the same land by its proper description to secure an indebtedness of $3,000. This mortgage also contained a release of homestead, and was otherwise formal and correct. On the sixteenth of August, 1884, Snell died, leaving Ellen J. Snell, his widow, and two minor children, John and William Snell, his only heirs-at-law. On the twentieth of October, 1885, Jane Snell filed a bill in the La Salle circuit court to correct her mortgage in respect to the erroneous number of the section, and to have the same foreclosed, making the widow and two minor children of Philip Snell, parties. The former made default, and the children answered in the usual way, by a guardian ad litem, no question being raised, the one way or the other, about the right of homestead. The court, on the hearing, entered a decree in conformity with the prayer of the bill. On the first of December, 1886, the master sold the premises, under the decree, to Byron D. Snell, and the same not having been redeemed within the time allowed by law, Snell received a master's deed therefor. On the ninth day of February, 1887, the widow and heirs of Philip Snell, the appellees herein, filed the present bill, claiming an estate of homestead in the premises, and prayed that the same be set off and assigned to them, as provided by law. The court on the hearing entered a decree in conformity with the prayer of the bill and the defendants bring the case here by appeal.

[After disposing of a question of the jurisdiction of the Supreme Court to consider the appeal, and adverting to the common-law disability of a married woman to convey, and her power to convey by joining with her husband pursuant to statutory provisions adopted before the first married woman's legislation in 1861, the court proceeded:]

Coming now to the merits of the case, it may somewhat aid us to advert hastily, and in a general way, to the legal disabilities of married women, as they existed here and in England, before the commencement of the reform legislation which has resulted in so radical a change in the present law on the subject. Their contracts, by the common law, as it existed in England, and in this state prior to the comparatively recent legislation on the subject, commencing in 1861, were absolutely void at law, and were equally so in equity, so far as imposing any personal obligation is concerned. They might, however, by such contracts, subject to certain limitations, bind their separate estate, but they imposed no personal obligation whatever. The right of a married woman to have a separate estate in personal property was purely a creature of equity, and the power to bind it (the estate, not herself) by a contract fairly entered into in respect to the estate, and on her own account, was regarded as a mere incident of such ownership. As her contract imposed on her no personal obligation, either at law or in equity, it therefore followed, as a logical result and legal sequence, that a bill would not lie to reform a contract or conveyance alleged to have been made by a married woman. As a conveyance of land by deed was a species of contract, it followed that an instrument executed by a married woman, purporting to convey real property, was absolutely void, both at law and in equity, and consequently could not be enforced or reformed. While at common law a married woman could not convey her own real estate, or release her inchoate right of dower or other interest in the lands of her husband, yet she might, through the instrumentality of a fictitious suit, called a fine or fine and recovery, permit another to recover whatever right she had in the land proposed to be conveyed, and thus, by a species of estoppel, bar her rights. At common law this was the only mode by which a married woman could dispose of her own lands or any interest she might have in those of her husband. This cumbrous and expensive mode of conveying her interests in real property was abolished by an act of the British parliament, (3 & 4 Wm. IV, c. 4, 74,) under the provisions of which the wife was enabled to accomplish the same ends as she has been able to do here from a very early period, by joining her husband in an ordinary deed of conveyance, subject to certain prescribed formalities, which, in all cases, had to be strictly complied with. But these statutory enactments, which enabled a married woman to make a valid transfer or conveyance of real property, did not at all affect her disabilities in other respects. As to her, the deed only operated as a conveyance; therefore, all covenants contained in it were, in law, the covenants of the husband only. It followed, that if her deed was not sufficient, on its face, to pass her property, there was no relief but to induce her to make another; and if she declined to do so, equity would not compel her, nor would it reform the instrument, for such a suit could not in any case, be maintained for either purpose, except upon the theory that a contract for a deed had existed between the parties. This, of course, could not be done in the case of a married woman, for the simple reason she could not make such a contract, nor, indeed, any at all; and of this the court would take judicial notice. It is therefore undoubtedly true that prior to the modern legislation in this state respecting the legal disabilities of married women, a court of equity had no power or authority to reform any alleged contract or conveyance made by a married woman, and in the case of a conveyance, it made no difference whether it related to a homestead or some other interest in land. All her conveyances, without regard to the character of the estate or interest granted, stood upon a common footing, and were controlled by the same principles. If they conformed to the requirements of the statute, she was bound by them; if not, they were void, and could not be enforced. The only difference in conveying a homestead and any other interest or right in land, was in the form of the deed, and the disposition of courts to liberally construe the act in favor of the homestead occupant.

The law, however, in respect to the rights and disabilities of married women, has of late years undergone a radical change. By the acts of 1861, 1869 and 1874, married women are to-day, and were at the time of the execution of the mortgages in question, placed upon a common footing with married men in respect to all property rights, including the means to acquire, protect, and dispose of the same. They may own, buy, sell, transfer and convey any and all kinds of property, to the same extent as married men or single women may, and subject to no other or different conditions or restrictions. Not only so, but their duties and obligations in respect to these rights and powers are the same as those of others sui juris. Like other persons, they must perform their contracts; and if they fail to do so, they are amenable to legal process to the same extent as if they were unmarried. If, in the execution of a deed by a married woman a mistake occurs, so that it does not truly state the contract between the parties, a court of equity will correct it against her, just as readily as it would against any other person. The only difference in respect to conveyances of husband and wife is, that any conveyance good at common law will pass his estate, whether his wife joins him in it or not, and the fact that it is not acknowledged before an officer, will make no difference; whereas, in the case of the wife, the statute requires that either the husband must join her in the deed, or, if executed by her alone, that it be acknowledged before some officer. Of course, this requirement of the statute is mandatory, and, if not complied with, the deed would be invalid. Nevertheless, in such case a court of equity, upon a proper showing in other respects, would compel the delivery of a deed executed in proper form. In the present case there was a simple, manifest mistake in the body of the deed, in describing the land. The homestead was formally released and waived, as required by the statute, and the only effect of correcting the error in the description of the property, was to make the deed express just what the parties to it originally intended it should. The appellees were parties to the decree reforming the deed. The court had jurisdiction of their persons. This is not denied. That the correction of mistakes in deeds and other written contracts executed by persons sui juris, is a part of the ordinary jurisdiction of courts of chancery, is beyond dispute. So it is not perceived why appellees are not bound by that decree. And if it be given effect, (as we hold it must,) it follows that appellees have no homestead in the premises, and the decree in the cause was consequently erroneous, and should be reversed for that reason.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

CHAPTER X

ESTOPPEL OF MARRIED WOMEN

SAVAGE v. FOSTER.

(Court of Chancery, 1722. 9 Mod. 35.)

Margaret Smith being seized of the lands in question, upon her marriage with Peter Flavill settled the same upon trustees and their heirs, to the use of the said Peter Flavill for life, then upon Margaret his intended wife for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder to the right heirs of the said Margaret for ever. The said Peter and Margaret had issue only one daughter, the now defendant, who was married to one Foster. Peter Flavill died, and then his widow married one Brown, by whom she had issue one other daughter, and no more; which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother was not able to give without breaking through this settlement, conveyed the said lands to the aforesaid Williams, etc., and the defendant Mr. Foster, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown. Whereupon the said Margaret conveyed these lands, etc., to the use of herself for life, remainder to Williams and his heirs; then the marriage took effect; and afterwards Williams sold these lands to the plaintiff Savage, who entered and built an house thereon.

And now Mrs. Foster, who was the issue in tail by virtue of the said settlement, and endeavoring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a feme covert, but that she should be concluded by this fact as well as if she was an infant.

It was argued for the defendant Mrs. Foster, that two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this court on the foot of fraud. It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with Williams, but did not know upon what terms; but if she had known the terms of that marriage, she was then a feme covert, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

On the other side it was first denied, that the two things beforementioned by the plaintiff's counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true, he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself, by giving the purchaser notice of such right; and though this defendant was a feme covert, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favour of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

The Court. Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this Court will establish it on the foot of fraud in the lessor, notwithstanding the statute of Frauds, etc.; because contracts executed in part are not always within the statute, though executory contracts are.

See Pyke v. Williams, 2 Vern. 455; Lockey v. Lockey, Prec. Chan. 519; Floyd v. Buckland, 2 Freem. 268; Gunter v. Halfey, Amb. 586; Earl of Aylesford's Case, 2 Stra. 783; Owen v. Davis, 1 Vesey, 82; Taylor v. Beech, 1 Vesey, 297; Potter v. Potter, 1 Vesey, 441; Lacon v. Mertins, 3 Atkins, 4; Whitebread v. Brockhurst, 1 Bro. Ch. Rep. 404; Whitchurch v. Bevis, 2 Bro. Ch. Rep. 566; Reading v. Wilkes, 3 Bro. Ch. Rep. 400.

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser.

See Mocatta v. Murgatroyd, 1 Peer. Wms. 393; Goodtitle v. Morgan, 1 Term Rep. 762; Towle v. Rand, 2 Brown's C. C. 650. And in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme coverts, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears, that they were so privy to it that it could not be done without their knowledge.

Therefore it was decreed, that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he shall pay costs. And the case of Watts v. Cresswell, 9 Viner, Abr. 415, was now remembered, where tenant for life borrowed money, and his son, who was the next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title. So in the case of one Clere [Clere v. Earl of Bedford, 13 Viner, Abr. 536], who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud.[1]

Nota, in the next sessions of parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition; but it was rejected for not coming in time.

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[1] In accord with the principal case: Patterson v. Lawrence, 90 Ill. 174, 32 Am. Rep. 22 (1878); Reis v. Lawrence, 63 Cal. 129, 49 Am. Rep. 83 (1883); Hand v. Hand, 68 Cal. 135, 8 Pac. 705, 58 Am. Rep. 5 (1886); Norton v. Nichols, 35 Mich. 148 (1876); Gray v. Crockett, 35 Kan. 66, 10 Pac. 452 (1886); Graham v. Meneilly, 16 Grant (U. C.) 661 (1869).

DAVENPORT v. NELSON.

(Court of King's Bench, Nisi Prius, 1814. 4 Campbell, 26.)

Goods sold. Plea, coverture.

Park, for the plaintiff, undertook to prove, that at the time the debt was contracted, the defendant had declared she was a widow; that she had executed deeds by this description, and that denominating herself a widow, she had sued out writs and carried on actions at law. He contended that by these declarations and acts she was estopped from giving evidence that she was then a feme covert. However,

Lord Ellenborough held, that she was at liberty to do so, and it was satisfactorily proved that before the debt was contracted, she was married to a man who is still alive.

Plaintiff nonsuited.[2]

LOWELL v. DANIELS.

(Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 161, 61 Am. Dec. 448.)

Writ of entry to recover two lots of land in Cambridge. Plea, nul disseizin.

At the trial in the court of common pleas, before Hoar, J., the demandant, to sustain his action, relied upon two mortgage deeds of the premises, with the usual covenants of warranty, made to him by John B. Hooton, one dated and acknowledged August 4th, 1836, and the other July 21st, 1837, and each recorded the next day after its date, and each containing, at the close of the description of the premises, the following reference: "Being the same conveyed to me by Rachel Smith by her deed dated August 1st, 1834." The demandant proved the execution of these mortgages, and the loan and non-payment of the moneys which they were given to secure, and here rested his case.

The tenant then proved title in the premises in Rachel Smith previous to 1834; that she was lawfully married to Michael Heffrein in February, 1835, and died in June, 1839, leaving her husband living, but no children by this marriage; and that Heffrein, with his wife, was in possession of the premises for a year or more after their marriage. And the tenant gave in evidence a deed to himself from Heffrein, of his interest in the premises, dated January 26th, 1839, and recorded January 30th, 1839. It also appeared that the tenant's wife was daughter of said Rachel by a former marriage, and had children by the tenant. The tenant then rested his case.

The demandant then proposed to read an office copy of the deed referred to in the mortgages, purporting to be from Rachel Smith to

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[2] Cannam v. Farmer, 3 Exch. 698 (1849); Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524 (1861).

John B. Hooton, bearing date of August 1st, 1834, acknowledged and recorded December 31st, 1835. The tenant produced and proffered to the demandant the original deed, and objected to the admission of the copy in evidence, on the ground that, not being an ancient deed, and coming in the direct line of the demandant's title, and referred to in his mortgage deeds, and no evidence being offered of any attempt to procure the original, which was now tendered to the demandant, it was not the proper instrument of evidence to prove title in John B. Hooton, the mortgagor, but that the original should be put in and its execution duly proved. But the objection was overruled.

The demandant then read the copy of the deed, which is a warranty deed, with the usual covenants, signed "Rachel Smith," and attested by two witnesses. The tenant objected to the deed, that when thus proved by the office copy, it could not be taken to have been delivered at a date earlier that the date of the record, which was subsequent to Rachel Smith's marriage to Heffrein, and so the copy could not be evidence of the execution and delivery of the deed at a time when she had capacity to convey by her sole deed; and that the title thereby dated from the time of its record, and not earlier. But the objection was overruled.

The demandant again rested here; and thereupon the tenant put in the original deed from Rachel Smith to John B. Hooton, and proved its execution at or about the time of the acknowledgment, namely, on the 31st of December, 1835.

There was some evidence tending to show, as the demandant contended, that said Rachel made this deed with the intention of preventing her husband Heffrein from holding any title to the premises; and that it was antedated, and signed and executed in the name which she bore before her marriage, for that purpose; and that it was made without his knowledge.

An agent and son of the demandant, who had charge of the matter, testified that when Hooton applied for the loan on the first mortgage, he caused the record title to be examined, and also asked Hooton for the original deeds of the property, who referred him to said Rachel; that he called upon her, and told her that he wished to examine Hooton's title; that she then produced the deeds under which she acquired title; that she knew that the application was for the purpose of taking a mortgage, or doing something about a mortgage; but that nothing was said directly about Hooton's title to the land, except as connected with her title, and those deeds were to assist in investigating his title; and that she communicated no defect in the title to the witness, who at that time had not heard of her marriage to Heffrein.

Upon these facts, the tenant asked the judge to instruct the jury, that the deed of Rachel Smith to John B. Hooton, being made by a married woman, without the concurrent action of her husband, or his joining in the same in any way, but made by her in the name which she bore while unmarried, and acknowledged by the same name, and delivered while she continued under coverture, was altogether void, and in no way effective to give the grantee named therein a valid title, or any title, and that consequently the mortgages made by him created no lien upon the estate, and the demandant could not recover.

But the judge declined to give the instruction requested by the tenant, and instructed the jury "that if Mrs. Heffrein made and executed the deed after her marriage; and it was antedated and signed by her, using the name which she bore before her marriage to Heffrein, with a fraudulent purpose, in which she concurred and participated, of giving the deed an effect which it would not have had in her true name and under the true date, knowing that it would deceive and impose upon some person to be affected by it; she and her heirs would be estopped to deny that the date of the deed which she thus executed and caused to be recorded was the true date; and against them the deed would be taken to have the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to make it; and this would be so whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other; or perhaps a better way of stating it would be, that in the case supposed the respondent would be estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. But mere passive conduct on her part, in suffering the demandant without notice to take a defective conveyance, or signing the deed by a wrong name with a wrong date, without a fraudulent purpose on her part, would not estop her heirs to deny the validity of the deed."

The jury returned a verdict for the demandant, and the tenant alleged exceptions. The arguments upon the points not decided are omitted.

Thomas, J. The decision of one of the questions raised by the bill of exceptions seems to be conclusive of the rights of the parties, and to this we have confined our attention. That question is, whether the tenant, whose wife is heir at law of Mrs. Heffrein, is estopped to deny the validity of the deed under which, through the deeds of Hooton, the demandant claims.

The deed of Mrs. Heffrein to Hooton, proprio vigore, conveyed no estate. The separate deed of a married woman, without the assent of the husband, it was absolutely void. Fowler v. Shearer, 7 Mass. 21; Concord Bank v. Bellis, 10 Cush. 276. It has no force, because the grantor had no capacity to make it. The instrument has the form and semblance of a deed, and nothing more. Indeed, the demandant does not contend that this deed has of itself any validity; but that, under the facts of the case, the tenant is estopped to deny its validity; or, in other words, the title of the demandant is the result of estoppel, and not of grant; or to speak perhaps more precisely, of an estoppel that works a grant.

The demandant, to show title in himself, offers the two deeds of mortgage from John B. Hooton. Deeds of warranty, they make prima facie evidence of the seizin of the premises in the demandant. The tenant then shows that the premises belonged to Mrs. Smith; that she died intestate; that his wife was her daughter and heir in law. The tenant thus makes an elder title. The demandant must now show that the estate that was in Mrs. Smith passed out of her and into his grantor. He undertakes to show it passed by deed. To do this, he must prove not merely the execution of the instrument, but its execution by one having the requisite legal capacity to make a deed. He offers for this purpose a copy from the registry, of a deed, purporting to be from Mrs. Smith to his grantor, bearing date August 1st, 1834. Assume that this is sufficient prima facie evidence of the execution and delivery of the deed at the time of its date; it is only prima facie, and when the evidence is closed, the burden is still on the demandant to show its execution and delivery, by one competent in law for that purpose. When the evidence is in, it appears that this deed was made, delivered, acknowledged and recorded, when the grantor was a married woman, and incapable of making it; that is, that it was absolutely void. By force of the deed, then, the demandant wholly fails to show that the land had passed from the tenant's wife's mother to his grantor.

Then the demandant says that the deed, upon its face, bears date of the first of August, 1834, when the grantor was sole and capable of making a deed; that it was signed with the name she bore before her marriage with Heffrein; and was so signed and dated with a fraudulent purpose, on her part, of giving the deed an effect, which it would not have had in her true name, and under the true date; knowing it would deceive and impose upon some person to be affected by it; and when the agent of the demandant called upon Mrs. Heffrein, stating to her that he wished to examine Hooton's title, and informing her that the application was made with a view to a mortgage, she produced the deeds of the land to herself, but did not communicate to the agent any defect in Hooton's title; and that therefore, whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other, the grantor and her heirs are estopped to deny that the date of the deed, which she executed and caused to be recorded, was the true date; and as against her and her heirs, the deed will be taken to be of the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to execute it; or in other words, the tenant is, upon these facts, estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. This we understand to be the view of the case taken by the learned judge, though perhaps in a critical examination of the language used by him, the silence of the grantor as to the defect of Hooton's title will not be found to be included as an element in the instruction given to the jury.

This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel in pais.

She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seized in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith, and for full consideration, cannot affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of the Concord Bank v. Bellis, above cited, in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase money, such deed of mortgage was wholly void. And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts in pais what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate.

This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.

But if Mrs. Heffrein were personally estopped to say this deed was executed by her while under coverture, we are not prepared to say that the daughter would be so estopped. The condition of the estate was this: The fee was in Mrs. Heffrein, with limited power of alienation; with no power indeed to convey, except by the joint deed of herself and husband (Rev. St. c. 59, § 2); and with no power to devise it. The law had given her no power by any act of hers to change the destination of the estate, or impair the title which at her decease would vest in her child. Upon her decease, the daughter enters into possession of the estate. She is rightfully there; the estate is in her, unless there has been an alienation of the estate in the mode prescribed by law, in the lifetime of the mother. If it be said that the mother was guilty of misrepresentation and concealment, for which coverture affords no protection; the answer might well be, that whatever might be the effect upon her personally, even if it estopped her to claim any interest in the estate, it could not do what the statute has not done, give her a power so to alienate the estate as to prevent the entry of her heirs at law upon her decease.

Such seems to us the result of the application of well settled principles of law to the case at bar. And upon a somewhat diligent examination of the authorities, we have found none to lead us to a different conclusion. The diligence of the counsel for the demandant has cited but two cases, having much tendency even to sustain the position that the estate of a married woman, incapable of making a deed, may pass by estoppel in pais. These are Hunsden v. Cheyney, 2 Vern. 150, and Savage v. Foster, 9 Mod. 35.

In both these cases the husband and wife, who jointly were capable of levying a fine, were parties to the original frauds. They were both suits in equity against the parties to the fraud. They both rely, as matter of authority, upon the case of the estoppels of infants, who are not incapable of conveying, but whose deeds are voidable only and not void; and neither of the cases is, we think, entitled to the highest consideration. If they established the point, for which they are cited, that the estate of a married woman may pass by her acts in pais, not only without the concurrence of the husband, but in fraud of his rights, we should question their application under our system, where the statute of frauds is equally binding in courts of equity as of law; where the powers of married women, in the conveyance or devise of lands, are defined and limited by express statute; and where the titles to real estate are matters of public record.

No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by estoppel in pais, who was incapable of conveying by deed. And though the courts of law have liberally applied the doctrine of estoppel in pais to cases of personal property, in the transfer of which no technical formalities intervene to prevent its application, we know of no case in which it has been applied to a party incapable in law of making a contract.

The result of the views we have felt compelled to take of the case is, that the deed of Mrs. Heffrein to the demandant's grantor was absolutely void, and that this tenant is not estopped to deny its validity.

New trial in this court.

BODINE v. KILLEEN.

(Court of Appeals of New York, 1873. 53 N. Y. 93.)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.

This was an action for goods alleged to have been sold and delivered by plaintiffs to defendant, a married woman, between May and September, 1869.

For several years prior to May 1st, 1869, the defendant had carried on business on her own account at 400 Broome street, in the city of

New York, and was accustomed to purchase stock in trade of plaintiffs. Up to the early part of 1868 such purchases were made through her husband, acting as her agent. He being taken ill, she subsequently made the purchases and payments herself. On May 1st, 1869, she sold out to her husband, and he opened and continued a similar business for himself in Twenty-Eighth street, and made purchases therefor of the plaintiffs upon credit.

The court charges the jury in effect that they were only to determine in this case whether notice was given plaintiffs by defendant of her retirement from business; that in case the plaintiffs had no such notice the verdict must be in their favor, to which defendant excepted; that if plaintiffs had notice of such fact or knowledge of facts sufficient to put them upon inquiry in respect thereof, and neglected to make it, the verdict must be for the defendant.

Defendant's counsel requested the court to charge the jury, that in case they were satisfied from the evidence that defendant at the time of the purchases in question was not actually engaged in business on her own account, no recovery could be had against her in this action. The court refused so to charge, and defendant excepted. The jury found a verdict in favor of the plaintiffs.

ALLEN, J. With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act.

A married woman is sui juris to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. Sherman v. Elder, 24 N. Y. 381. Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity; that is, the incapacity is not removed by any fraudulent representation of the actor. The law will not permit one legally incapacitated to do that indirectly which he or she cannot do directly.

That is especially the case in respect to infants and married women laboring under the common-law disabilities, the law imposing the disqualification from motives of public policy, and for the safety of those regarded as weak, and needing this protection. Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Lowell v. Daniels, 2 Gray (Mass.) 161, 61

Am. Dec. 448; Goulding v. Davidson, 26 N. Y. 604. But the reason of the rule ceasing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a feme covert is answerable for the frauds of her agent while acting within the scope of the agency, although the fraud may be without her knowledge or assent. Baum v. Mullen, 47 N. Y. 577. By statute (Laws 1860, c. 90) a married woman may carry on any trade or business on her sole or separate account, and the earnings from her trade or business are her sole and separate property, and she may sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. She has all the legal capacity to do every act incident to the business or trade in which she may engage which a feme sole would have, that is, full legal capacity to transact the business, including, as incidents to it, the capacity to contract debts and incur obligations in any form, and by any means, by which others acting sui juris can assume responsibility.

This defendant, for many years prior to May, 1869, had been doing business in New York city as a retail grocer, buying her goods of the plaintiffs on credit. During most of the time, and until some time in the year 1868, her husband had acted as her agent in making the purchases and payments. The husband was taken ill in 1868, and from that time she made the purchases and payments to the plaintiffs, but there was no revocation of the agency of the husband. About the first of May she transferred the business to her husband, who subsequently carried it on at a different place in the same city, and bought the bills of goods, for which action is brought, during the month of May. The jury have found that there was no notice to the plaintiffs of the change in the business, and that they had no knowledge of it. Credit was in fact given to the defendant, and not to her husband. The plaintiffs had the right to presume that the business of the defendant, and the agency of her husband in respect to it, continued until actual notice of change in the business, and a revocation of the agency. Suffering the plaintiffs to act upon this presumption, she is estopped from alleging the contrary. She had capacity to continue the business in which she had been engaged, and whether she expressly represented to the plaintiffs that the business was still hers and her husband was her agent, or the facts were legally and naturally inferable from her acts or her silence is immaterial. She is bound by the appearances which she has given to the transaction, and upon the faith of which others have acted, up to the limits of her legal capacity to act. In other words, to the extent of her legal capacity, the apparent authority of the husband to act for and bind her must be taken as the real authority, so far as others have been induced to act upon it, and have parted with their property upon the faith of it. It is simply because the defendant had the power to contract the debt for which this action is brought, that she may be estopped by her acts from disputing her liability, and the existence of this capacity takes the case out of the principle of the authorities relied upon by the counsel for the appellant. This is the only question presented by the record, or urged by the appellant, although it is made the subject of several exceptions in different forms upon the trial. The case was well disposed of at the circuit.

The liability of the defendant does not depend upon the fact that she was actually carrying on a business or trade on her sole and separate account, but upon her capacity to do so, with the other circumstances establishing her liability.

The judgment must be affirmed. All concur.

Judgment affirmed.[3]

FARMINGTON NAT. BANK v. BUZZELL.

(Supreme Court of New Hampshire, 1880. 60 N. H. 189.)

Assumpsit, upon two joint and several promissory notes, made in 1878, signed by the defendants, and payable to the plaintiffs or order. The name of Josie M. F. Buzzell was first upon the notes. Samuel H. Buzzell and Jacob P. Buzzell were defaulted. Josie M. F. Buzzell pleaded that at the time of making the promises she was and still is the wife of said Samuel H. Buzzell, and that the promises were made as surety for her husband; and upon the trial the issue was, whether the defendant, Josie M. F. Buzzell, signed the notes as surety, or in behalf of her husband, or as principal.

The notes being produced in evidence, and the name of Mrs. B. appearing as principal and first upon them, the plaintiffs' counsel contended that she was estopped from showing that she signed the notes as surety for her husband, or that her promises were an undertaking in his behalf; but the court ruled otherwise, and allowed her to introduce evidence tending to show that she was in fact surety only upon the notes; and the plaintiffs excepted. The plaintiffs requested the court to instruct the jury that if the notes in suit were presented to the bank by Mrs. B., or her agent, bearing her name as principal, and were accepted by the bank with the understanding that she was principal, she is to be holden as principal unless it was made known to the bank that the contract was really one of suretyship, or for or on account of the husband. The court declined to give these instructions, and instructed the jury that if the notes were in fact executed by her as surety, or for and on account of her husband, she is not liable, although the plaintiffs did not know these facts, but understood and believed when the notes were discounted that Mrs. B. signed them as principal; and the plaintiffs excepted. The jury returned a verdict for the defendants, which the plaintiffs moved to set aside.

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[3] See, also, Western New York & P. Ry. Co. v. Riecke, 83 App. Div. 576, 81 N. Y. Supp. 1093 (1903).

A fortiori, when the wife falsely represents that she is carrying on a business, and that the contract was for the purposes of that business, she will be liable, though the facts are otherwise. Smith v. Weeks, 65 Vt. 566, 27 Atl. 197 (1892). So, when a married woman induced the plaintiff to sell her goods by representing that she was the owner of a check for $100, out of which she promised to pay for the goods, she was estopped to deny her ownership of the $100 check, and so a personal judgment could be had against her as upon a contract made in relation to her separate estate. Read v. Hall, 57 N. H. 482 (1876). See, also, the cases where the wife stands by and acquiesces while the husband conveys her separate personal property as if it were his. Pahmeyer v. Meyer (Tenn. Ch.) 53 S. W. 982 (1899). Or obtains credit on the husband's apparent ownership of the property. Locklin v. Davis, 71 Vt. 321, 45 Atl. 224 (1899). Contra: Kinsey v. Feller, 64 N. J. Eq. 367, 51 Atl. 485 (1902).

FOSTER, J. The question presented by the case is, Can a wife bind herself as a surety for her husband? It is conceded that at common law she could not, acting for herself, enter into such a contract. But the common law disability of married women, as judicially interpreted in a former state of society, has been essentially modified by the development of a later and different state of society; and their rights have been enlarged and defined both by adjudication and legislation. In this case it is attempted to hold Mrs. Buzzell personally liable as the surety of her husband on the notes in suit. Whether she received and used the money represented by the notes, is a question which is immaterial in our present inquiry. Messer v. Smyth, 58 N. H. 298; Yale v. Wheelock, 109 Mass. 502; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408.

The General Laws (c. 183, § 12) provide that a married woman "may make contracts, and sue and be sued in all matters in law and equity, and upon any contract by her made * * * as if she were unmarried; * * * provided that no contract or conveyance by a married woman of property held by her in her own right as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her." This statute, it is claimed, gives her capacity to make the contract of suretyship for her husband, because it gives her capacity to make other contracts, and that, being qualified to make the contract, she may be estopped to claim the protection of the statute. This reasoning is based on the assumption that all her common-law disabilities as to contracts are removed. But it was evidently the legislative intention to leave her, in cases like the present one, subject to the protection of the common law. The proviso in the statute is, in effect, a re-enactment of the common-law disability of a married woman to be a surety for her husband. Major v. Holmes, 124 Mass. 108.

As Mrs. Buzzell did not possess the legal capacity to make this contract, the plaintiffs, however innocent, cannot enforce it against her. 1 Pars. Notes and Bills, 276, 277; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. Concealment, fraud, or falsehood as to her relation to the contract, cannot confer capacity on her so as to entitle the plaintiffs to an action against her on the contract. Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448. For false representations and fraud a party may be subjected to punishment and to damages in a proper form of action, and legal incapacity to make a contract would not necessarily be a bar to the action. Fitts v. Hall, 9 N. H. 441. At common law a married woman is not estopped by her covenants, and she cannot by her own act enlarge her capacity to bind her separate estate. Palmer v. Cross, 1 Smedes & M. (Miss.) 48; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378. Her disqualification as a party to a contract prevents the application of an estoppel; otherwise it could be said that though she cannot make a contract because of her incapacity, when she attempts to make one by fraud or misrepresentation, legal ability, is in some way conferred by estoppel; that is, she is not qualified to make a contract for herself, but is liable on one that she unsuccessfully tries to make. Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Lowell v. Daniels, 2 Gray (Mass.) 161, 169, 61 Am. Dec. 448; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. In cases of torts she may be estopped to deny that her representations are true; but in such cases her legal incapacity to bind herself by contract is not denied or qualified, and is not material as a ground of defence. Big. Est. 488, 490; Liverpool Adelphia Loan Association v. Fairhurst, 9 Ex. 422.

Although the acceptor of a bill or the maker of a note is estopped to say that the drawer and payee, or indorser, is an infant or a married woman, it does not follow that the infant or the married woman would be estopped to plead their incapacity. The maker of a negotiable note warrants that the payee has authority and capacity to transfer the title by indorsement; and if the payee happens to be a married woman, he makes the same warranty as to her capacity; but her disability to make a contract is not his disability to make the warranty. Therefore, in an action on the note, while he would be bound by his warranty of her capacity to make the indorsement, she would not be bound, because at common law she is not a competent party to the contract. Sto. Prom. Notes, § 87; Byles, Bills, 64; George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195; Drayton v. Dale, 2 B. & C. 293; Taylor v. Croker, 4 Esp. 187.

Judgment on the verdict.

Clark, J., did not sit; the others concurred.

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[4] Accord: Levering v. Shockey, 100 Ind. 558 (1884); Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655 (1899). But see Greig v. Smith, 29 S. C. 426, 436, 7 S. E. 610 (1888).

CHAPTER XI

LIABILITY OF MARRIED WOMEN FOR TORTIOUS DAMAGE CAUSED BY THEM—RESPONSIBILITY OF MARRIED WOMEN FOR CRIMINAL ACTS

KOSMINSKY v. GOLDBERG.

(Supreme Court of Arkansas, 1884. 44 Ark. 401.)

SMITH, J. This action was against the husband alone for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: (1) Where the husband is absent and had no knowledge of the intended act, as in Head v. Briscoe, 5 Carr. & Payne. 484, 24 E. C. L. R. 667, where a man was held answerable for a libel published by his wife, although they were permanently living apart. See, also, Catterall v. Kenyon, 3 Q. B. 309, 40 E. C. L. R. 749. (2) Where the husband is absent, but where the tort is done under his direction and instigation, as in Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270. (3) Where the husband was present, but the wife acted of her own volition, of which Cassin v. Delany, 38 N. Y. 178, is an example. And (4) where the tort is committed in the company of the husband, and by his command or encouragement; for instances of which see Daily v. Houston, 58 Mo. 361; Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presense, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Com. 149, where it is said, "If committed in his company, or by his order, he alone is liable."

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states prima facie a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or influence her act. Pomeroy's Remedies, § 320; Bliss on Code Pleading, § 85.

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. Gantt's Dig. § 1233; Edwards v. State, 27 Ark. 493.

Judgment reversed, with directions to require defendant to answer the amended complaint.[1]

WRIGHT v. LEONARD.

(Court of Common Pleas, 1861. 11 C. B. [N. S.] 258.)

This was an action for a false representation by the female defendant.

The declaration, after stating that one James Jones Salt was possessed of certain bills of exchange therein described, and being three in number, and respectively drawn by the said James Jones Salt, and directed to the defendant Daniel Leonard, averred that the said bills of exchange purported to be accepted by the said Daniel Leonard, and that the said James Jones Salt, being possessed of the said bills so purporting to be accepted as aforesaid, and before they respectively became due and payable, applied to the plaintiffs to discount the said bills for him, the said James Jones Salt; and, further, that the said Elizabeth, being desirous that the plaintiffs should discount the said bills as aforesaid, and wrongfully and injuriously intending to deceive and defraud the plaintiffs in that behalf, then falsely, fraudulently, and deceitfully represented and asserted to the plaintiffs that the said bills of exchange so purporting to be accepted by the said Daniel Leonard as aforesaid were in truth and in fact accepted by him, and that he was liable thereon; and that thereupon the plaintiffs, confiding in the said representation and assertion of the said Elizabeth, then discounted the said bills, and advanced to the said James Jones Salt the sum of £500. for the same; and the said James Jones Salt then indorsed and delivered the said bills purporting to be so accepted as aforesaid to the plaintiffs; whereas, in truth and in fact, the said bills were not accepted by the said Daniel Leonard or by any person with his authority or consent, and the said Daniel Leonard was not liable on the same, and had refused to acknowledge or pay the same, or to be bound thereby; and the said bills became due and payable before the commencement of this action: Averment that the plaintiffs had done and performed all conditions precedent, and that all necessary times had elapsed to entitle them to maintain the action.

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[1] In the following cases the wife was held not liable, in accordance with the doctrine of the principal case: Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772 (1863); Emmons v. Stevane, 73 N. J. Law, 349, 64 Atl. 1014 (1906).

In the following cases the presumption of coercion by the husband was rebutted, and the wife was jointly liable with the husband: Smith v. Schoene, 67 Mo. App. 604 (1896); O'Brien v. Walsh, 63 N. J. Law, 350, 43 Atl. 664 (1899); Cassin v. Delany, 38 N. Y. 178 (1868); Marshall v. Oakes, 51 Me. 308 (1864); Warner v. Moran, 60 Me. 227 (1872); Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270 (1876); Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66 (1858).

Observe, also, a similar doctrine with respect to a married woman's responsibility for her criminal acts. Mikell's Cases on Criminal Law, p. 59 et seq. Where the married woman acts under the compulsion and coercion of her husband and in his presence, she is not responsible. Commonwealth v. Feeney, 13 Allen (Mass.) 560 (1866); Commonwealth v. Burk, 11 Gray (Mass.) 437 (1858). Except in cases of treason and murder. Bibb v. State, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88 (1891). There is a presumption of compulsion if the wife acts in the presence of her husband. State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498 (1901). Except, perhaps, in the case of perjury. See Commonwealth v. Moore, 162 Mass. 441, 38 N. E. 1120 (1894); Smith v. Meyers, 54 Neb. 1, 74 N. W. 277 (1898). The presumption of coercion, when it exists, may be rebutted. Commonwealth v. Eagan, 103 Mass. 71 (1869); State v. Jones, 53 W. Va. 613, 45 S. E. 916 (1903). When the wife does not act in the presence of or under the control of her husband, she is of course responsible. Commonwealth v. Feeney, 13 Allen (Mass.) 560 (1866); Rex v. Hughes, 2 Lew. 229 (1813).

Fourth plea, that the said Elizabeth, at the time of making the alleged representation and assertion, was the wife of the defendant Daniel.

To this plea the plaintiffs demurred, the grounds of demurrer stated in the margin being, "that a married woman who makes a false and fraudulent representation as in the declaration mentioned, is liable in damages for the same: also that the plea neither traverses the declaration nor confesses and avoids it, but merely reiterates what is averred in the declaration." Joinder.

The court being equally divided in opinion, the judges proceeded to deliver their judgments seriatim, as follows:

Byles, J. I am of opinion that our judgment should be for the defendants.

The record shews that the female defendant, a married woman, fraudulently represented to the plaintiffs that certain acceptances were the acceptances of her husband, and thus the plaintiff, relying on those representations, was thereby induced to advance money on the bills to one Salt, the drawer.

The law is settled, that a married woman is liable with her husband for her torts, but that, on the other hand, she is not liable on her contracts made during coverture. The law is the same as to infants: they are liable for their torts, but not (with certain exceptions) on their contracts. There is a class of intermediate cases, partaking partly of the nature of contracts and partly of the nature of torts, in which the question arises to which category they are to be referred.

It is not easy to lay down any general rule on the subject: but I conceive that, at all events, misrepresentations on the faith of which the plaintiff has acted, and which might have been treated by him as contracts or warranties, are not binding on the feme covert or the infant; for, if they were binding, then the protection which the law throws over married women and infants would be in great measure withdrawn. Thus, a misrepresentation by an infant that he is of full age (Johnson v. Pye, 1 Levinz, 169, 1 Sid. 258, 1 Keble, 905, 913), or a false statement by a married woman that she is discovert (Cooper v. Witham, 1 Levinz, 247, 1 Sid. 375, 2 Keble, 390, Cannam v. Palmer, 3 Exch. 698), are no ground of action.

In America, there have been a great number of decisions to the effect that an infant is not liable for fraud, in cases where a contract is in substance the ground of action, or where it is contained in a contract which he is not capable of making.

And it should seem that the law is the same in cases where there may be other objections to the validity of the contract besides the disability of the infant or married woman; such, for example, as the absence of consideration: for, otherwise, an infant or a married woman might be liable where they have received no consideration, and not liable where they have received consideration.

The cases in which a married woman is liable for defamatory words are obviously distinguishable from cases in which she is sought to be made liable in an action ex contractu or ex quasi contractu. In the case of defamatory words, there is not only no contract or semblance of a contract on the part of the married woman herself, but there is no agreement or assent express or implied on the part of the plaintiff. This distinction is indicated somewhat obscurely in the case of Cooper v. Witham as reported in Levinz.

In the present case, the representation on which it is sought to charge the husband and wife seems to me to be in the nature of a warranty. But, for the reasons above given, it does not appear to me necessary to decide whether on such a warranty as is described in the declaration, an action might be brought, independently of the objection of coverture.

WILLES, J., delivered the joint judgment of WILLIAMS, J., and himself:

In this case husband and wife are sued for a false and fraudulent representation by the wife to the plaintiffs that the acceptance on bills of exchange offered to them for discount by one Salt was of the handwriting of the husband, whereby the plaintiffs were induced to advance money to Salt by way of discount of the bills, which was lost by reason of the acceptances being forgeries.

The question is, whether these facts constitute a cause of action against the husband and wife. We are of opinion that they do. As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is "directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction." Such was the decision of the Court of Exchequer in Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422, 429. This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law.

We ought also to add that this exception, in favour of fraud accompanying a contract, does not, so far as we have been able to discover, exist in the civil law, nor in the law administered in the Court of Chancery, nor in that of Scotland,—which may be thought to shew that it is not founded in any general principle, and therefore not to be enlarged. For the civil law as to minors, see 3 Savigny's Roman Law, c. III, § cviii, p. 33 of French edition; Mackeldey, translation of 1st part, 222. For the Scotch law as to infants, see 1 Bell's Com. 18. For the law of Chancery as to infants, see Stikeman v. Dawson, 1 De Gex & Sm. 90; Ex parte Unity Bank Association, 3 De Gex & Jones, 63. For the Scotch law as to married women, see 1 Bell's Com. by Shaw (6th Ed.) 679. For the doctrine in Chancery, see Vaughan v. Vanderstegen, 3 Drewry, 165, 369, 27 Law J. Ch. 793.

The present case falls within that general rule, there having been, if the declaration truly states the facts, no contract with the wife. In the event of her evidence shewing a contract in the course of entering into which the alleged misrepresentation was made, the question will then arise upon the facts, under the general issue, whether such a fraud is shewn as falls within the rule or the exception. For the present, seeing that liability for a naked fraud, not accompanying a contract, is in question, we think there should be judgment for the plaintiffs.

Erle, C. J. Upon this demurrer the question is raised whether a husband is answerable for the alleged false representation made by his wife: and I am of opinion that he is not. The law makes him answerable for wrongs done by his wife to the property, person, or character of another, but not answerable for contracts made by his wife. It seems to me that a false representation by which credit is obtained is in its nature more fit to be classed with contracts than with wrongs. It is in substance a warranty of a debt, and so a contract. The liability is created by the words of the wife, amounting to a contract or guarantee, to which are to be added an intention on her part to deceive and a deception effected on the plaintiff. But, in substance, she becomes a guarantor for a third party, and makes a contract for which in the form of contract the husband is not answerable.

The nearest authority on the point is in favour of the defendant; for, in Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422, it was held that the husband is not answerable for a false representation made by his wife in connection with a contract made by her. It is there decided that he is to be exempt from responsibility for the false representations so made. I see no reason for holding that the exemption should be limited to the particular case there in question. I see no reason why the addition of a breach of contract to a false representation should create the exemption.

One reason assigned in argument for the exemption was, that the damage arises from the credulity of the plaintiff, who chooses to trust the wife: but that reason would exempt the husband in respect of all false representations made by the wife.

I would further observe that liability for false representations which are unconnected with contract was first affirmed in Pasley v. Freeman, 3 T. R. 51. The motive for the judgment of the majority of the judges in that case, is, the desire to suppress fraud: but by that desire they created an undefined liability, of which parties have availed themselves for fraudulent purposes; so that the effect of the decision has been the reverse of that which was intended. If this view is correct, there is good reason for not carrying the principle beyond the cases to which it has been adjudged to apply: and it has not been adjudged to apply to the false representation made by a wife.

For these reasons, together with the reasons and authorities adduced by my Brother Byles, I think our judgment should be for the defendant.

Judgment for the plaintiffs.[2]

The plaintiffs being desirous of taking the opinion of a court of error, Williams, J., withdrew his opinion, and consequently the judgment was entered pro forma for the defendant.

Judgment accordingly.

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[2] See, also, Keen v. Hartman, 48 Pa. 497, 86 Am. Dec. 606, 88 Am. Dec. 472 (1865), where the married woman obtained a transfer to her of the notes of a third party in exchange for a bond and mortgage on her representation that she was sole, and was held not liable. To the same effect, see Brunnell v. Carr, 76 Vt. 174, 56 Atl. 660 (1904).

CHAPTER XII

SUITS BETWEEN HUSBAND AND WIFE

CROWTHER v. CROWTHER.

(Supreme Judicial Court of Maine, 1868. 55 Me. 358.)

APPLETON, C. J. The case comes before us on an agreed statement of facts, and the question presented is whether a wife can maintain a suit against her husband on a note given her by him.

At common law such a suit could not be maintained. By Rev. St. 1857, c. 61, § 3, the wife is authorized to "prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband." This section manifestly refers to suits by the wife against third persons and empowers her to maintain an action in her own name or in the joint names of herself and husband, at her election. It does not contemplate a suit by the wife against the husband, nor that he should be arrested and imprisoned at her instance. Such has been the uniform construction of this and similar statutes in this State and in Massachusetts. Smith v. Gorman, 41 Me. 408; Jackson v. Parks, 10 Cush. (Mass.) 550; Ingham v. White, 4 Allen (Mass.) 412. If the present statutes do not adequately protect the rights of the wife, it is for the Legislature to make such further provision for their protection as it may deem expedient.

Plaintiff nonsuit.[1]

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[1] See, also, Spencer v. Stockwell, 76 Vt. 176, 56 Atl. 661 (1904), post, p. 568; Hobbs v. Hobbs, 70 Me. 381 (1879); Hobbs v. Hobbs, 70 Me. 383 (1880).

But the wife could prove her claim against her husband's insolvent estate. Weeks v. Elliott, 93 Me. 286, 45 Atl. 29, 74 Am. St. Rep. 348 (1899). And the wife's administrator could recover against the husband's executor. Morrison v. Brown, 84 Me. 82, 24 Atl. 672 (1891). And after a divorce could sue him in her own name. Webster v. Webster, 58 Me. 139, 4 Am. Rep. 253 (1870).

In the following cases the married women's legislation was sufficient to give the husband and wife the right to sue each other on obligations admittedly valid. May v. May, 9 Neb. 16, 2 N. W. 221, 31 Am. Rep. 399 (1879); Trayer v. Setzer, 72 Neb. 845, 101 N. W. 989 (1904); Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285, 5 L. R. A. (N. S.) 611 (1906); Grimes v. Reynolds, 94 Mo. App. 578, 68 S. W. 588 (1902); Grimes v. Reynolds, 184 Mo. 679, 68 S. W. 588, 83 S. W. 1132 (1904). See, also, cases, post, p. 597 et seq.

In equity there never was any procedural difficulty with suits between husbands and wives. A husband could sue his wife. Brooks v. Brooks, Precedents in Chancery, 24 (1691); Stone v. Wood, 85 Ill. 603 (1877). And a wife (by her next friend) could sue her husband. Lady Elibank v. Montolien, 5 Ves. Jr. 737 (1799–1801); Johnson v. Vail, 14 N. J. Eq. 423 (1862); Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001 (1899); Heckman v. Heckman, 215 Pa. 203, 64 Atl. 425, 114 Am. St. Rep. 953 (1906); Frankel v. Frankel, 173

CHAPTER XIII

MARRIAGE AS THE EXTINCTION OF THE ANTE-NUPTIAL LIABILITIES OF THE PARTIES TO EACH OTHER

CANNEL v. BUCKLE.

(High Court of Chancery, 1724. 2 P. Wms. 243.)

A feme sole was seised in fee of land of about 10*l*. per annum, and designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to the husband and his heirs; and for that purpose, previous to the marriage, she gave a bond of 200*l*. penalty to the intended husband, in which the intended marriage was recited, and the condition was, that in case the marriage took effect, she would convey all her said lands to the husband and his heirs.

The marriage took effect, and there was issue of the marriage, and the wife made her will reciting her said bond, and devised all her land to her husband in fee and died.

The issue of the marriage died without issue; after which the husband enjoyed the land during his life, and on his death the heir of the husband brought a bill against the heir of the wife, to compel him to convey the lands of the wife to the heir of the husband.

Obj. This bond given by the wife became void upon the intermarriage, because it was then suspended; and a personal action once suspended is extinct: besides, wherever no action lies at law to recover debt or damages, there no suit in equity lies to compel a specific performance, which specific performance is given in equity only in lieu of damages; and 1 Chan. Cases, 21, (Lady Darcy's case) was cited, proving that where a woman on a treaty of marriage agrees with a man, or a man with a woman, there the subsequent intermarriage determines the agreement.

LORD CHANCELLOR [LORD MACCLESFIELD]. The impropriety of the security, (viz.) a bond from a woman to a man whom she intends to marry, or the inaccurate manner of wording such bond, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the feme in consideration of marriage, agrees the man shall have the land as her portion; and this agreement being upon a valuable consideration shall be executed in equity. It is

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Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266 (1899); Kittredge v. Kittredge, 79 Vt. 337, 65 Atl. 89 (1906).

That the creation of a remedy at law does not oust the jurisdiction of chancery in suits between husband and wife, see Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001 (1899).

unreasonable that the intermarriage, upon which alone the bond is to take effect, should itself be a destruction of the bond, and the foundation of that notion is, that in Law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas in Equity, it is constant experience, that the husband may sue the wife, or the wife the husband, and the husband might sue the wife upon this very agreement in the principal case. Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at Law on an agreement for damages, there a suit will not lie in Equity for a specific performance, as is plain from this case: suppose a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in consideration of a competent settlement, Equity would execute the agreement, though no action would lie at Law to recover damages.

But in regard this bond was a very stale one (being given so long since as in 1678), and the husband had for so long a time omitted to sue upon it in Equity, the Court ordered a trial at Law to see whether this bond was executed or not, and all other matters to be respited till after the trial.

CHAPMAN v. KELLOGG.

(Supreme Judicial Court of Massachusetts, 1869. 102 Mass. 246.)

Contract on a promissory note made by the defendant April 6, 1866, under her maiden name of Caroline M. Fisk, for $200 payable on demand to the order of the plaintiff. Writ dated January 14, 1868. The answer admitted the making of the note, and alleged that the defendant afterwards married Nathaniel Kellogg, who was still living, and that he paid the note.

At the trial in the superior court, before Vose, J., there was evidence that the defendant married Nathaniel Kellogg in July, 1866, and lived with him until January 1, 1867, when he left her, and that he was still living but never afterwards returned to her; that she never paid the note or furnished means to pay it; and that between October 24, 1866, and January 1, 1867, difficulty arose between her and her husband.

There was also evidence that on October 20, 1866, the plaintiff made demand on her to pay the note, and she replied that she had no means to do so and referred him to her husband; that on October 24, 1866, the plaintiff proposed to the defendant's husband that he should buy the note, and he agreed to do so "provided the plaintiff would indorse it, and take it back in case of any difficulty between him and his wife"; that the plaintiff agreed to these terms, and on receiving from the defendant's husband the amount due on the note delivered it to him indorsed by himself, and saw nothing more of it until September, 1867, when the defendant's husband called on him to take it back, and he did so and paid the defendant's husband for it.

The defendant requested the judge to rule that, "if the defendant's husband at the request of his wife paid to the plaintiff the amount due on the note, it was payment for the defendant and extinguished the debt, and the note could not be again put in circulation as a valid note to any party having notice of these facts;" and also that, "if the note was paid by and transferred to the defendant's husband, it was a payment and extinguishment of the debt, and the note could not be again put in circulation as a valid note."

The judge declined so to rule, and instructed the jury as follows: "If the defendant's husband, at the request of his wife, paid to the plaintiff the amount due on the note, intending to extinguish the debt, that was payment of the note for the defendant, and extinguished the debt, and the note could not be again put in circulation as a valid note, to any party having notice of these facts. The purchase by and transfer of the note to the husband under an agreement with the plaintiff that the husband should hold the note and that the plaintiff should pay back the money and resume possession and control of the note, if desired by the husband, and a retransfer and sale of the note by the husband to the plaintiff in pursuance of this agreement, would not extinguish the debt and prevent the plaintiff from maintaining the present suit."

The jury found for the plaintiff, and the defendant alleged exceptions.

Chapman, C. J. The note in suit was originally valid, having been given to the plaintiff by the defendant while she was sole. When she married Kellogg, it remained valid against her; but under our present statute her husband did not become liable to pay it. Gen. St. c. 108, § 8.

According to the plaintiff's testimony, he sold it to her husband, and indorsed it to him, and thus the husband acquired the legal as well as the equitable title to it. The agreement, that the plaintiff should take it back in case of any difficulty between the defendant and her husband, did not prevent the title from vesting absolutely in the husband, for the husband was under no obligation to return it, except at his own option.

The question presented is, whether this title in the husband operated to extinguish the contract. At common law, there can be no doubt that it would have done so.[1] One of the reasons for the extinguishment would be, that the husband became liable by the marriage for its payment. The statute has taken this ground away, by releasing the husband from his liability for his wife's debts. But another ground was, that he could not maintain an action against his wife on a contract, because there could be no valid contract between them. This principle has not been changed by statute. A contract between husband and wife is still a nullity. Lord v. Parker, 3 Allen, 127; Edwards v. Stevens, 3 Allen, 315; Ingham v. White, 4 Allen, 412, 415. He cannot even indorse a note to her. Gay v. Kingsley, 11 Allen, 345.

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[1] But even at law a bond by a man to his intended wife upon a condition not to be performed in his lifetime (viz., the payment of money by his heirs or executors to the intended wife) would not be extinguished by the intermarriage, and the plaintiff might sue upon it after her husband's death. Milbourn v. Ewart, 5 Term R. 381 (1793).

This note then, when it passed into the hands of the defendant's husband, he having the legal as well as equitable title to it, became a nullity. And, it having been once extinguished, he had no power to revive it against her by retransferring it to the plaintiff. The question here decided is different from that decided in Bemis v. Call, 10 Allen, 512.

Exceptions sustained.[2]

SPENCER v. STOCKWELL.

(Supreme Court of Vermont, 1904. 76 Vt. 176, 56 Atl. 661.)

TYLER, J. It appears by the statement of facts that the defendant, being indebted to Rosa B. Shepardson for money that she had loaned him, gave her his promissory note for the amount [payable to "Rosa B. Shepardson or order"]; that a few months afterwards the parties intermarried, and that the marriage relation has ever since existed between them; that the note belongs to the wife and was overdue when this suit was brought; that she indorsed it to the plaintiff for the purpose of collection only, and that suit was brought after demand of payment.

I. Under the married women's act (Laws 1884, p. 79, No. 84), which is incorporated into V. S. 2644–2647, inclusive, the note continued to be the property of the wife after the marriage. It is true, as the defendant contends, that this statute, which gives married women the right to hold all personal property and rights of action acquired by them before marriage to their sole and separate use, only enables them to make contracts with all persons other than their husbands, and to sue and be sued upon such contracts. But the contention cannot be maintained that the note in this case became null and void and the debt extinguished by the intermarriage, for this is contrary to the express provisions of the statute. It is immaterial that the wife acquired the property in this note from the defendant while the parties were sole. It was the payee's property until the marriage, and the statute is broad enough to include it within its terms. It says, "All personal property * * * acquired by a woman before coverture. * * *" It makes no exception.

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[2] On the same principle a note made by a man to a woman was extinguished by the marriage of the two, and the transfer of the note by indorsement by the woman after his death could not make the note the valid basis of a claim against the promisor's estate. Abbott v. Winchester, 105 Mass. 115 (1870). Accord: Long v. Kinney, 49 Ind. 235 (1874); Gosnell v. Jones, 152 Ind. 638, 53 N. E. 381 (1899); Schilling v. Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892 (1899); Farley v. Farley, 91 Ky. 497, 16 S. W. 129, 13 Ky. Law Rep. 39 (1891).

After divorce it has been held that the wife cannot sue the husband for her seduction by him occuring before the marriage, although a statute permitted an unmarried female to prosecute as plaintiff an action for her own seduction, and another statute provided in substance that a married woman may bring an action as if sole for injury to her personal character. Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848 (1896). Compare post, p. 597 et seq.

Sweat v. Hall, 8 Vt. 187, and Ellsworth v. Hopkins, 58 Vt. 705, 5 Atl. 405, are not authorities for the defendant. They only hold that a promissory note given by a husband to his wife during coverture is void because of the legal incapacity of the parties to contract with each other. But both these cases recognize the doctrine that where the note represents a separate statutory or equitable property in the wife, a court of equity will protect it.

The defendant cites Abbott v. Winchester, 105 Mass. 115, where it was indeed held that a note given by a man to a woman whom he afterwards married became a nullity upon the marriage and was not revived by the husband's death. But the doctrine held in that case and in Chapman v. Kellogg, 102 Mass. 246, was repudiated in Butler v. Ives, 139 Mass. 202, 29 N. E. 654. In the latter case a husband advanced money to his wife for the benefit of her separate estate, and she gave her promissory note therefor, secured by mortgage, to a third person who assigned the note and mortgage to the husband. The husband assigned the note and mortgage to a fourth person who foreclosed the mortgage and brought a writ of entry against the person who was claiming under the wife. Held, that the writ could be maintained.

But it is unnecessary to consider the decisions of courts of other states. The doctrine of the common law by which all the personal property of the wife became her husband's upon marriage has been abrogated by our statutes. Wright v. Burroughs, 61 Vt. 390, 18 Atl. 311, is authority that, under existing laws, the note in this case was the sole property of the wife when she transferred it to the plaintiff. It was held in that case that the husband was improperly joined as a party plaintiff with his wife in a suit upon her note against a third person.

II. It is further contended that, as the wife could not sue her husband upon the note, she could not give the plaintiff authority for that purpose. It is a sufficient answer to this claim that the wife retained every right in respect to the note after her marriage that she possessed before, except the right to sue her husband upon it. She could sell the note absolutely, or transfer it for collection as well after as before her marriage. The statute places no inhibition upon this act; on the contrary, it gives her the same authority to deal with the note as if she were unmarried. She did not confer authority upon the plaintiff to sue the defendant; that authority was incident to the plaintiff's legal title to the note, although the equitable interest remains in the wife.

Judgment affirmed.[3]

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[3] Accord: Power v. Lester, 23 N. Y. 527 (1861); Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194 (1868).

CHAPTER XIV

CONTRACTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE

SECTION 1.—AT COMMON LAW

[At common law a conveyance or transfer of real property direct from the husband to the wife (Firebrass v. Pennant, 2 Wilson, 254 [1764]), and from the wife to the husband was void (Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736 [1906]). Such transfers were accomplished by the conveyance to a third party, who conveyed to the husband or remained as trustee for the wife for her separate use, as the case might be. Jewell v. Porter, 31 N. H. 34 (1855); Thatcher v. Omans, 3 Pick. (Mass.) 531 (1792); Riley v. Wilson, 86 Tex. 240, 24 S. W. 394 (1893). Contracts between husband and wife were void (Bassett v. Bassett, 112 Mass. 99 (1873), but a contract might be made by the husband with a third person as the trustee for the wife.]—Editor's Note.

SECTION 2.—IN EQUITY

SHEPARD v. SHEPARD.

(Court of Chancery of New York, 1823. 7 Johns. Ch. 57, 11 Am. Dec. 396.)

The bill stated: That the plaintiff was the widow of Hazel Shepard, deceased. That before their marriage, in May, 1806, H. S., being seised of fifty acres of land, in Pittstown, and part of lot 8, in Hoosick's patent, in Rensselaer county, executed a deed, dated April 12th, 1806, reciting their intended marriage, and that if they should purchase any real estate during their marriage, the plaintiff should have a right of dower in the same during her widowhood, and he released to her dower therein; "but no other right of dower to any other real or personal estate he then had, or might have, by means of selling any real or personal estate he then had, and buying and paying therewith." The plaintiff, on the same day, executed a deed to H. S., reciting their intended marriage, and releasing to him all right of dower in his estate, real or personal, by virtue of the intended marriage. That after their marriage on the 26th of December, 1808, H. S. executed a deed to the plaintiff, (she being his wife,) in consideration of natural affection, and to make provision for her when a widow, of a lot of land described, to hold during her widowhood. And, afterwards, on the 6th of January, 1817, H. S., in consideration of natural affection, executed the deed to the defendant, his son, releasing to him the same land he had before released to the plaintiff. That on the same day the defendant, by deed, in consideration of 1000 dollars, released to H. S. 48 acres of the land described, during his life; and the defendant covenanted with H. S. that he would pay annually to the plaintiff, during her widowhood, the sum of 60 dollars, or at his election, the sum of 400 dollars, in two equal annual payments, to commence from the day of the death of H. S., if the defendant should so elect; and the payment of the annuity, or of the 400 dollars, was to be on condition that the plaintiff should release to the defendant all right, as widow of H. S., or by virtue of any deed, or otherwise, to the said estate of H. S.; and if she refused so to do, the covenants of the defendant were to be void. The land described in the deed of the 26th of December, 1808, and that of the 6th of January, 1817, was the same land. H. S. died on the 25th of April, 1819, and the plaintiff remains his widow, without any provision for her support. The defendant is in possession of the land described in the last mentioned deed; and the plaintiff having brought an action against him, upon the deed from H. S. to her, the defendant set up in defence, that the deed was void in law. The defendant never made his election to pay the plaintiff 400 dollars. The plaintiff had offered to release to the defendant all her right to the estate of H. S., mentioned in the deed, provided the defendant would pay to her the annuity, which he refused to do. No land was purchased by H. S. and the plaintiff during their marriage. The defendant had the title deeds, and refused to assign to the plaintiff her dower. Prayer, that the defendant be decreed to release to the plaintiff all his right to the land described in the deed of the 26th of December, 1808, for her life, or widowhood, to take effect as of the 28th of April, 1819, and to deliver the possession thereof, and account for the rents and profits from the death of H. S.; or, if the plaintiff should so elect, that the defendant be decreed to pay to her annuity during her widowhood, upon her releasing to him all her right in the land; and that he secure such annuity by a mortgage on the land, or otherwise; or if that cannot be done, that the defendant be decreed to assign to the plaintiff her dower, and account for the mesne profits, &c.

The defendant, in his answer, admitted the deeds as stated in the bill; and that the deeds between H. S. and the plaintiff, before their marriage, were in his possession. He insisted, that the deed of the 26th of December, 1808, from H. S. to the plaintiff, was void. That the covenants of the defendant in favour of the plaintiff, were without consideration. That on the 11th of October, 1817, H. S. being indebted to him, on various accounts, H. S., in consideration that the defendant would discharge him from those demands, agreed to discharge the covenants, and mutual releases were accordingly executed.

He admitted that he had made no election to pay the plaintiff 400 dollars, or the annuity, and insisted that he was not bound to make an election; that the yearly value of the lands is not 60 dollars. He admitted that he had refused to assign to the plaintiff her dower, and submitted that her claim was matter of law, and triable at law, and not in Chancery. He alleged, that the consideration of the deed of H. S. to him, was 25 dollars, which he paid, and the life-estate was conveyed to H. S. in the premises.

The cause was heard on the bill and answer.

The Chancellor [James Kent] * * * 1. The deed from H. S. to the plaintiff, was undoubtedly void in law, for the husband cannot make a grant or conveyance directly to his wife, during coverture. Co. Litt. 3, a. And in equity, the Courts have frequently refused to lend assistance to such a deed, or to any agreement between them. Thus, in Stoit v. Ayloff, 1 Ch. Rep. 33, the husband promised to pay his wife 100 pounds: they separated, and she filed her bill for that sum. But the Court would not relieve the plaintiff, "because the debt was sixteen years old, and the promise made by a husband to a wife, which the Court conceived to be utterly void in law." Again, in Moyse v. Gyles, 2 Vern. 385, Prec. in Ch. 124, the husband made a grant or assignment of his interest in a church lease, to his wife: she brought a bill, after his death, to have the defective grant supplied, and the Court held the grant to be void in law, and dismissed the bill, as the grant was voluntary and without consideration. So, in Beard v. Beard, 3 Atk. 72, the husband, by deed poll, gave to his wife all his substance which he then had, or might thereafter have. Lord Hardwicke considered the deed poll to be so far effectual, as to be a revocation of a will, by which the testator had given all his estate to his brother; yet that it could not take effect as a grant or deed of gift to the wife, "because the law will not permit a man to make a grant or conveyance to the wife, in his lifetime, neither will this Court suffer the wife to have the whole of the husband's estate, while he is living, for it is not in the nature of a provision, which is all the wife is entitled to." But a suitable provision, by deed from a husband to his wife, will be supported in equity.

It is to be observed, that none of these cases were determined strictly and entirely upon the incapacity of the husband to convey to the wife, according to the rule of law; and they do not preclude the assertion of a right, in a Court of equity, under certain circumstances, to assist such a conveyance. The Court relied upon the staleness of the demand in the first case, and upon the want of consideration in the second, and upon the extravagance of the gift in the third, as also constituting grounds for the decree; and it is pretty apparent, that if the grant in each case had been no more than a suitable and meritorious provision for the wife, the Court would have been inclined to assist it. In Slanning v. Style, 3 P. Wms. 334, Lord Talbot said, that Courts of equity have taken notice of, and allowed feme coverts to have separate interests by their husbands' agreement, especially where the rights of creditors did not interfere. And in More v. Ellis, Bunb. 205, articles of agreement, executed between husband and wife, were held binding without the intervention of trustees. So, in Lucas v. Lucas, 1 Atk. 270, L. Harkwicke admitted, that in Chancery, gifts between husband and wife have often been supported, though at law the property is not allowed to pass; and he referred to the case of Mrs. H. and to that of Lady Cowper. And in the very modern case of Lady Arundel v. Phipps, 10 Ves. 146, 149, Lord Eldon held, that a husband and wife after marriage, could contract, for a bona fide and valuable consideration, for a transfer of property from the husband to the wife, or to trustees for her.

The consideration for the deed to the wife, in the case before me, was very meritorious. It was "natural affection, and to make sure a maintenance for the said Anna S., wife and consort of H. S., in case she should survive him." She had been induced, prior to the marriage, to release to H. S. all right and claim of dower to arise under the intended marriage, and the consideration for this release, was an engagement on his part, that she should have dower in any real estate to be purchased by them "by their prudence and industry during the cohabitation." But no estate was purchased by them by those means, and, according to the literal terms of those deeds, she was barred of her dower without any substitute. The deed to the wife, of certain lands, being part and parcel of his estate, for and during her widowhood, was, therefore, no more than a just and suitable provision, and one that a Court of equity can enforce consistently with the doctrine of the cases. The defendant does not stand in the light of a creditor, or of a purchaser for a valuable consideration without notice, and we have none of the difficulties before us, which such a character might create. He does not deny notice of the existence of the deed to the plaintiff, when he received the deed of the same lands from H. S.; and he does not pretend that he gave any thing more than the nominal consideration of 25 dollars, though the consideration of 1000 dollars was inserted in the deed. The fact that he did, on the day of the date of that deed, reconvey the lands to H. S., his father, for life, and did annex thereto a covenant to pay to the plaintiff an annuity of 60 dollars, during her widowhood, (and which he now says is more than the annual value of the land,) is decisive evidence that he took the land of his father, with knowledge of the equitable claim of the plaintiff, and with an engagement on his part, to give her a reasonable compensation in extinguishment of that claim.

I conclude, accordingly, that the deed from the husband to the wife, may and ought, in this case, to be aided and enforced by this Court. This would seem to be the most safe and effectual relief to her, and it is one that her husband intended, before the alienation of his affections. The defendant would deprive her not only of her rights under this deed, but of all right and title to dower, by reason of her ante-nuptial release, and also of all compensation, in lieu of dower, under his covenants, which were made to the husband, and by him subsequently released.

[Remainder of opinion omitted.][1]

SLANNING v. STYLE.

(High Court of Chancery, 1734. 3 P. Wms. 334.)

Three sisters, being residuary legatees and executors of their father, brought their bill against the wife for divers goods of the testator detained by her which were not given her by the said will. The wife preferred her bill for goods detained by the executors and which, as was alleged, she was entitled to by the will.

Another thing insisted upon on behalf of the defendant, the widow, was, that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm, (over and besides what was used in the family) for her own separate use, calling it her pin money; and upon the death of the first wife, and until the testator married the defendant Style, the testator's sister the defendant Pelling, kept his house, and had the same allowance, which was also continued to the defendant the widow, after her marriage, by way of pin money; and it was proved in the cause, that her husband, whenever any person came to buy any fowls, pigs, &c, would say, he had nothing to do with those things, which were his wife's; and that he also confessed, that having been making a purchase of about £1000. value, and wanting some money, he had been obliged to borrow £100. of his wife to make up the purchase money; therefore now the widow claimed to be paid this £100.

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a feme covert, which was what the law did not favour; that it was no more than a connivance or permission, that the wife should take these things and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement being after marriage, was but a voluntary one, for which a Court of Equity usually leaves the party to take his remedy at Law; and that, in truth, the husband's borrowing this £100. of his wife, was no more than borrowing his own money.

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[1] Hunt v. Johnson, 44 N. Y 27, 4 Am. Rep. 631 (1870); Jones v. Obenchain, 10 Grat. (Va.) 259 (1853); Sims v. Rickets, 35 Ind. 181, 9 Am. Rep. 679 (1871); Dale v. Lincoln, 62 Ill. 22 (1871); Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629 (1905). A fortiori, a chattel mortgage given by the husband to the wife to secure a loan from her to the husband would be enforced in equity. Garwood v. Garwood, 56 N. J. Eq. 265, 38 Atl. 954 (1897). The conveyance by the wife of her equitable separate estate to the husband was sustained in equity. See Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319 (1888), ante, p. 502. But the conveyance by the wife to her husband of her general estate has been held ineffective, even in equity. Gebb v. Rose, 40 Md. 387 (1874); Giffin v. Giffin (Tenn. Ch.) 37 S. W. 710 (1896); Worrell v. Drake, 110 Tenn. 303, 75 S. W. 1015 (1903). But see Doty v. Cox, 22 S. W. 321, 15 Ky. Law Rep. 68 (1893), where the court appears to have enforced the conveyance from the wife to the husband, while admitting that at law it would be void.

But the LORD CHANCELLOR [LORD TALBOT][2] decreed, that the widow, the defendant, was well entitled to come in for this £100. as a creditor before the Master; observing, that the Courts of Equity have taken notice of and allowed feme coverts to have separate interests by their husband's agreement: and this £100. being the wife's savings, and here being evidence, that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail, were it to determine by the husband's death; that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered, that the wife should be allowed to come in for this £100. as a creditor before the Master; and the Court cited the case of Calmady versus Calmady, where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.[3]

BROWNE v. BIXBY.

(Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 69, 76 N. E. 454.)

KNOWLTON, C. J. This is a bill in equity, brought by the administrator with the will annexed of a married woman, against the executors of the will of her husband. It comes to this court on an appeal of the plaintiff from a decree sustaining the defendants' demurrer and dismissing the bill. The case presented by the averments of the bill shows a joint note of the husband and wife, given for a loan of $8,000 made to the husband by the Georgetown Savings Bank, with a mortgage upon the wife's real estate, given as security for the note. The husband was the principal, and the wife was a surety, who signed her name and conveyed her separate property for his benefit, as security for his debt. Her legal representative now seeks to compel his representatives to exonerate her property and relieve her estate from liability by paying the note. The principal ground of the demurrer is that the transaction was a contract between husband and wife, which neither a court of law nor a court of equity will enforce.

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[2] Statement abridged and only so much of case given as relates to one point.

[3] See, also, Mockridge v. Mockridge, 62 N. J. Eq. 570, 50 Atl. 182 (1901); Bishop v. Bourgeois, 58 N. J. Eq. 417, 43 Atl. 655 (1899). In Demarest v. Terhune, 62 N. J. Eq. 663, 50 Atl. 664 (1901), a bill by a husband to enforce the promise of the wife against her separate estate was sustained.

The foundation of the suit is not a contract made by the husband with his wife, but the application of a familiar law of suretyship, which gives a surety a right, as between him and his principal, to be reimbursed for his payments and relieved from liability for outstanding debts by the principal who is primarily liable for them. The relation of husband and wife, existing between the principal and the surety, does not prevent the enforcement of this general rule. In Minot, Petitioner, 164 Mass. 38, 41, 41 N. E. 63, the law is stated by Mr. Justice Allen as follows: "When a husband and wife join in a mortgage of her land to secure a debt of the husband, her estate is considered only as a security for the debt for which the husband and his estate are primarily liable; and the wife or her heir, after the death of the husband, will be entitled to have it exonerated out of the estate of the husband." In Savage v. Winchester, 15 Gray, 453–455, the subject is fully discussed by Mr. Justice Hoar, with a citation of the authorities, and the rule is stated broadly in similar language. In Robinson v. Gee, 1 Ves. Sr. 251, 252, Lord Hardwicke said: "It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After the husband's death, she is entitled to have her real estate exonerated out of the personal and real assets of the husband: the court considering her estate only as a surety for his debt." This dictum has become generally recognized law, both in England and America. Aguilar v. Aguilar, 5 Madd. 414; Hudson v. Carmichael, Kay, 613; Neimcewicz v. Gahn, 3 Paige (N. Y.) 614; Wilcox v. Todd, 64 Mo. 388; Shea v. McMahon, 16 App. D. C. 65; Johns v. Reardon, 11 Md. 465; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Hubbard v. Ogden, 22 Kan. 363; Shinn v. Smith, 79 N. C. 310.

The defendants contend that, if an action of this kind can be maintained, it should be brought by heirs or devisees, and not by the administrator with the will annexed. It does not appear what disposition of the real estate is made by the will in this case; but, even if the plaintiff is not called upon to administer it directly, we are of opinion that he has an interest to have it exonerated sufficient to enable him to maintain the suit. Whether it goes to devisees under the will, or to heirs as undevised property, if the mortgage is enforced against it, the devisee or heir will be entitled to resort to the administrator to have the debt paid out of the personal assets, to the exemption of the real estate. In this way the plaintiff is interested to have the mortgage discharged, so that the personal estate of the testatrix may not be held upon her note, or upon a claim of the heir or devisee, if the real estate is taken under the mortgage.

Decree reversed. Demurrer overruled.

SECTION 3.—UNDER VARIOUS MARRIED WOMEN'S ACTS [4]

RICO v. BRANDENSTEIN.

(Supreme Court of California, 1893. 98 Cal. 465, 33 Pac. 480, 20 L. R. A. 702, 35 Am. St. Rep. 192.)

SEARLS, C. Appeal from a judgment in favor of defendants, and from an order denying a motion for a new trial.

The action was brought for a partition of the southeast two-thirds of the Rancho San Barnardino, situate in the county of Monterey. The two plaintiffs claim to be the owners of an undivided one-eighth, each as tenants in common, with defendants Brandenstein and Godchaux, who are averred to be each the owner of an undivided three-eighths in said rancho. The answer denies the ownership of plaintiffs, or that they were ever tenants in common with defendants, and avers ownership in defendants to the entire tract of land except as to certain lots conveyed by them to third parties. The area of the land in question is 8,901 and $^{25}/_{100}$ acres. Francisco Rico, the father of the plaintiffs, on the tenth day of January, 1855, became the owner of the premises in controversy, and on August 27, 1855, conveyed the same by deed to Tomasa Sepulveda Rico, his wife. The title asserted by plaintiffs in the action rests upon a deed of trust of the premises, dated November 9, 1857, executed by Francisco Rico and Tomasa Sepulveda Rico, his wife, as parties of the first part, to the said Francisco Rico, as party of the second part. The deed purports to be in consideration of $15,000, paid to the parties of the first part by Theodora Gonzales and Jose Sepulveda, the receipt of which is acknowledged and which the proofs show was actually paid. The remaining portions of the deed important to the inquiry, are as follows: "And by these presents doth bargain, sell, remise, release, and quit-claim and convey unto Francisco Rico, in trust for and the use, interest, behoof, benefit of Guadalupe Rico, Francisco Rico, Junior, Vicente Rico, and Alexander Rico, all being legitimate children of the parties of the first part hereof, * * * all now living, and all other offspring that may be born hereafter of the said parties of the first part thereof, all the right, title, and interest of the parties of the first part hereof in and to. * * * This conveyance is intended as a deed of trust, to be held by the said Francisco Rico, under the express conditions hereinafter set forth, that is to say, to hold the same aforementioned premises to, and for the uses, interests, and purposes of the said minors, Guadalupe, Francisco, Vicente, and Alexander Rico, now living, and also all other children that may be born hereafter of the said parties of the first part hereof, to receive the rents, issues, and profits of the said lands and improvements thereon, and apply the same to the use and benefit of the said afore-mentioned children now living, and all others that may be born hereafter of the said parties of the first part hereof during their natural lives." Then follows a clause authorizing the said Francisco Rico to appoint his successors as trustee of said property for said children during his lifetime and by will after his death. The trustee and beneficiaries are forbidden to sell, pledge, or hypothecate, the land and premises described in the deed. The deed was duly acknowledged and recorded in the office of the county recorder of the county of Monterey, November 9, 1857.

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[4] After the Illinois married women's act of 1861, equity still remained the proper forum in which the wife enforced contracts against her husband (Whitford v. Daggett, 84 Ill. 144 [1876]; Hoker v. Boggs, 63 Ill. 161 [1872]), and the conveyance of property from her husband (Dale v. Lincoln, 62 Ill. 22 [1871]). But see Thompson v. Allen, 103 Pa. 44, 49 Am. Rep. 116 (1883).

Francisco Rico, the grantee of the deed of trust, was one and the same person with Francisco Rico, one of the grantors, and the grantors were husband and wife. The plaintiffs herein were their children, born subsequent to the execution of the deed of trust. Defendants Brandenstein and Godchaux hold the premises under a conveyance in trust, executed by the same grantors in 1862, to third parties as trustees.

It was admitted at the trial, for the purposes of the case, that if plaintiffs are not the owners of two-eighths of the rancho defendants are the owners thereof.

The first question presented by the record relates to the validity of the deed from Rico and wife to the husband. It must be assumed that at common law the wife could not convey her separate property to her husband. The contention of appellant is, that conceding the property to have been the separate property of the wife, still, at the time of the deed there was under the statute of this state no restriction upon such a conveyance.

Section 14, art. 11, of the constitution of this state, adopted October 10, 1849, provided that "All property, both real and personal of the wife, owned and claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property as to that held in common with her husband." By an act approved April 17, 1850, the legislature, in obedience to the requirements of the constitution, passed a law by which the husband was given "the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon unless by an instrument in writing, signed by the husband and wife and acknowledged by her upon an examination separate and apart from her husband before," etc. The seventh section of the same act provided, "that when any sale shall be made by the wife of any of her separate property for the benefit of her husband, or when he shall have used the proceeds of such sale, with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same." St. 1850, p. 254. An act concerning conveyances, passed April 16, 1850, provides as follows:

"Sec. 19. A married woman may convey any of her real estate by any conveyances thereof, executed and acknowledged by herself and her husband, and certified, in the manner hereinafter provided by the proper officer taking the acknowledgment."

A number of other statutes might be referred to tending to indicate the evident policy of our law-makers, to loosen the chains which bound married women at the common law, and so far as their separate property is concerned, to confer upon them like power of alienation with that possessed by their husbands. Step by step the work has gone on until now "a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner." Civ. Code, § 1189.

We are dealing, however, with a question which depends not upon the present condition of the law, but upon the status and rights of married women as they existed in 1857, the date of the deed under consideration. No question is made here as to the due execution of the deed by the husband and wife, or that it was properly acknowledged as required by statute. The contention of respondents in this behalf is that the deed is void, because at the date of its execution, to wit, November 9, 1857, a married woman could not convey real property directly to her husband. The husband was required to join in the conveyance. The objects of the statute in requiring the husband to join with his wife in the conveyance of her separate property, as it has been said, was to afford her his protection against imposition and fraud, and to aid her by his counsel and advice. Meagher v. Thompson, 49 Cal. 190. The requirement of the statute is analogous to the rule of the civil law, under which the wife must have the authorization of her husband, or a decree of a judge, before she could convey any of her rights or enter into a civil contract. The wider experience of men in business affairs, their better opportunities for becoming conversant with property values, and the mode of its transfer, as well as the important object of promoting unity of purpose and harmony of action in the close relation existing between husband and wife, may well have conduced to the enactment of the law requiring them to join in a conveyance of property, which, while belonging to the wife, was yet subject to the management and control of the husband. The law required them to join in the conveyance, and there is no disposition to question either its wisdom or its binding force, and these remarks are only indulged as tending to a better understanding of the cognate question, Can the husband and wife convey her separate real property to the former?

This court has repeatedly decided that a husband, when free from debt, may make a gift to his wife of either his separate property, or of the community property of the husband and wife. Barker v. Koneman, 13 Cal. 9; Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Dow v. Gould, etc. Co., 31 Cal. 653; Woods v. Whitney, 42 Cal. 361; Higgins v. Higgins, 46 Cal. 263. It does not necessarily follow that the converse of the proposition is true, and that the wife can convey by way of gift to her husband. If, however, she cannot do so, or rather, if she could not do so under the law we are considering, viz., the statute in force in 1857, it must be because of the inherent condition of the parties as husband and wife.

The owner of property competent to convey may convert himself into a trustee by making a proper declaration of the trust in writing. Suarez v. Pumpelly, 2 Sandf. Ch. (N. Y.) 336; Pinkett v. Wright, 2 Hare, 120. A trust is valid only to the extent of the legal capacity of the one creating it. Tiff. & B. on Trusts and Trustees, p. 2. Any person may create a trust who is capable of making a valid distribution of property. The power to dispose of property involves the right to attach such limitations to the act of disposition as will vest the legal estate in one and the beneficial interest in another. At common law neither husband nor wife could convey property directly to the other. The power to alienate and to take property on the part of the husband was unaffected by marriage, except in the single instance of conveyances to and from his wife. To the wife the common-law system was a source of constant repression. Her husband became the absolute owner of her personal property, and was entitled to the rents, issues and profits of her real estate. To relax the severity of the rules of her environment as a wife, many of the states have adopted laws similar to the one under consideration, empowering her to convey her real property by joining with her husband in the deed of conveyance, and in a few of the states, New York and California (since 1891) included, a conveyance by a married woman may be made in the same manner, and has the same effect as if she were unmarried. Under these laws, however, the courts in numerous instances still adhere to the doctrine that the wife cannot convey her property directly to her husband.

The general result of the reasoning of the cases may be summarized as follows:

1. These statutes are for the benefit of married women and not for that of their husbands; and any construction which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the very object of the law.

2. The inhibition of the common law, as applied to the husband, was

that he could neither convey to his wife directly, or be a grantee from her; and while the right of the wife to take by gift removes the impediment to a voluntary conveyance from the husband to her, yet the right to receive such voluntary conveyance from the wife has not been conferred upon the husband, and he stands as at common law incapacitated from taking by deed of gift directly from his wife.

3. The "power to convey and devise real and personal property as if she was unmarried" does not enlarge the powers of the grantees under conveyances by her, and she could not devise to a corporation or person incapable of taking by will, or convey to one incompetent to be a grantee.

4. To render a conveyance from the wife to her husband valid, the husband's common-law disability, as well as that of the wife, must be removed. White v. Wager, 25 N. Y. 328; Brooks v. Kearns, 86 Ill. 547; Scarborough v. Watkins, 9 B. Mon. (Ky.) 545, 50 Am. Dec. 528; Card's Leg. & Eq. Rights Mar. Wom. § 428; Amer. & Eng. Encycl. of Law, tit. "Husband and Wife," p. 794; Bish. Mar. Wom. §§ 711, 712; Kinnaman v. Pyle, 44 Ind. 275; Winans v. Peebles, 32 N. Y. 423; Sims v. Rickets, 35 Ind. 181, 9 Am. Rep. 679.

I find no case extant in which under a statute requiring the husband and wife to join in the conveyance of her separate property, a sale and conveyance from the latter to the former has been sustained. The law having provided for the joinder of the husband in this class of conveyances, with a view, as has often been declared by this court, of giving the wife the benefit of the husband's counsel, advice, and judgment, it would seem strange and illogical to permit him at the same time to act as her opponent, as one working against her interests and seeking to obtain her land for himself, either with or without limitations upon the effect of the conveyance.

In Colorado, Iowa, and some other states, statutes have been passed giving to married women the same rights of alienation of their separate property as those enjoyed by unmarried women. Where such laws prevail, we may reasonably expect to see their right to convey directly to their husbands as well as to others finally upheld, as has already been done in a number of cases. Wells v. Caywood, 3 Colo. 487; Simms v. Henry, 19 Iowa, 287; Robertson v. Robertson, 25 Iowa, 350; Allen v. Hooper, 50 Me. 371; Burdeno v. Amperse, 14 Mich. 97, 90 Am. Dec. 225.

The views herein enunciated are expressly confined to an interpretation of the statute as it existed prior to the amendment of 1891, and are not intended as an exposition of the rights of married women under the broader ægis of that amendment.

I am of opinion that under the law as it existed in 1857, the husband and wife could not legally convey her separate real estate to the husband, and that the deed of trust to the latter, set out in the record, was void.

This view renders a consideration of the other points made in the case unimportant.

The judgment and order appealed from should be affirmed.[5]

TEMPLE and BELCHER, CC., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HARRISON, J.
GAROUTTE, J.
PATERSON, J.

MAY v. MAY.

(Supreme Court of Nebraska, 1879. 9 Neb. 16, 2 N. W. 221, 31 Am. Rep. 399.)

This was an action brought by Hattie May in the district court for Richardson county upon two promissory notes executed by John May, the first for $1,000 to one Kooken, and by him assigned to the plaintiff, and the second for $728.81 directly to the plaintiff. Plaintiff and defendant were husband and wife, and the notes sued on were made and delivered and suit brought thereon while they occupied that relation. The defense set up in the answer was that said plaintiff, Hattie, was the wife of said defendant, John, and to this answer a demurrer was filed, and, upon argument before Weaver, J., overruled. Plaintiff excepted and brought the cause to this court by petition in error.

COBB, J. Although there is but one practical question presented by the record in this case, yet it will perhaps be found more convenient, for the purpose of its proper consideration, to divide it into two at the outset.

First. Does the making and delivery of a promissory note by a married man to his wife for a valuable consideration constitute a valid and binding contract?

Second. Can a married woman while living with her husband maintain an action against him on a promissory note made and delivered by him to her since the marriage?

It will be readily conceded that unless we find authority for an affirmative answer to these questions in our statutes they must both be answered in the negative. The sections of our statute applicable to the first branch of our inquiry are as follows:

"Section 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, or she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. [Laws 1875, p. 88.]

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[5] A fortiori, under similar statutes the conveyance from the wife to the husband is ineffective when the wife is the sole grantor: Graham v. Stuve, 76 Tex. 533, 13 S. W. 381; Hughey v. Mosby (Tex. Civ. App.) 71 S. W. 395 (1902); Smith v. Vineyard, 58 W. Va. 98, 51 S. E. 871 (1905); Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736 (1906); Hogan v. Hogan, 89 Ill. 427 (1878); Ogden v. M'Arthur, 36 U. C. Q. B. 248 (1875).

"Sec. 2. A married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on trade or business and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." [Gen. St. p. 465, c. 41.]

This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may use the language) to her to "bargain, sell, and convey her real and personal property, and enter into any contract in reference to it," to "sue and be sued," to "carry on trade or business and perform any labor or service on her sole and separate account," and to use and invest her earnings in her own name, contracts with her husband are not excepted.

The provisions of the statute of Maine on this subject are as follows:

"Section 1. A married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance; except real estate conveyed to her as security or in payment of a bona fide debt actually due from her to her husband. When payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase.

"Sec. 2. A woman having property is not deprived of any part of it by her marriage, since the act approved March 22, 1844, was in force; and a husband by marriage, since that time, acquires no right to any property of his wife. * * * A married woman may release to her husband the right to control her property, or any part of it, and dispose of the income thereof for their mutual benefit, and may in writing revoke the same.

"Sec. 3. She may receive the wages of her personable labor, not performed for her own family, maintain action therefor in her own name, and hold them in her own right against her husband or any other person."

Rev. St. Me., 1871, p. 491.

Under this statute the case of Webster v. Webster, 58 Me. 139, 4 Am. Rep. 253, was commenced and decided. That was an action on a note made and delivered by the defendant to the plaintiff January 22, 1861 (the above statute being then in force), and they being then married (at the date of the note) and living together as husband and wife. At the October Term, 1869, they were divorced a vinculo. Afterwards she brought the suit on the said note, and had judgment at the superior court. On error to the supreme court it was held, that while for purely technical reasons she could not have maintained the suit until after the divorce or the termination of the marriage relation in some other way, yet that the giving of the note created a valid contract between the parties, and that the defence of marriage (which was urged and relied upon by plaintiff in error) was purely technical. It continues only while that relation continues, and ceases with its termination. The judgment was affirmed.

The statute of Kansas in relation to the rights of married women is identical with our own. Under its provisions the supreme court of that state has held, in a case where a married woman living with her husband bought a horse from him and paid him for it out of her separate money—how or when acquired by her is not stated—which horse was soon afterwards levied upon by a constable by virtue of an execution against the husband, that she could maintain replevin against the constable for the horse. Thus necessarily holding that the husband and wife, while living together in that relation, were competent to make legal and binding contracts with each other, so as to pass the title of property ex vi termini. Going v. Orns, 8 Kan. 85, which case has been followed by later cases in that state.

In the state of Iowa, under a statute somewhat different from ours, though not different in principle, it was held in a case where, during the marriage relation, the husband borrowed money from his wife and gave her his note for it, that the same was a valid and binding contract, and that he being deceased she could maintain a suit thereon against his administrator. Logan v. Hall, 19 Iowa, 491.

As long ago as 1841 it was held by the supreme court of Ohio that a note given by a husband to his wife for a loan of money by her to him, out of a dower interest received by her from the estate of a former husband, created a legal obligation which—the maker of the note having deceased—would be enforced against his administrator.

Huber v. Huber's Administrator, 10 Ohio, 371, which case was followed in 1857 in Wood v. Warden, 20 Ohio, 518.

In none of the above mentioned states has the legislature passed any act which in terms changes the common law in regard to the nature and character of the marriage relation or the unity of the persons of husband and wife, and the above cases must have gone upon the theory that the statutes of the said states respectively defining the rights of woman in the marriage relation in respect to the ownership, control, and disposition of property, have in effect done away with the technical unity of husband and wife as formerly existing at common law. At least, such is my opinion. So that when our statute says that "a married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may," etc., it means that she may sell the same to, or contract with reference to the same with, anybody who is generally competent to contract and that the other contracting party will be bound by such contract regardless of whatever relations may exist between them.

I come, therefore, to the conclusion that the plaintiff in error was competent to receive the said note set forth in the first cause of action set out in the petition from the said Josiah Kooken, and the same constitutes a legal cause of action in her hands against the defendant in error. Also that the note made and delivered by the defendant in error to the plaintiff in error, as set forth in the second cause of action in the said petition, is a legal and binding contract between the parties.

[The court then held that the plaintiff in error could maintain the action against the defendant in error in the district court while they were living together as husband and wife.]

Reversed and remanded.[6]

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[6] In Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273 (1899), it was held that the wife could not sue her husband for interest due on a note from him to her executed after the marriage. The court said: "It [section 2213 of the Code of 1873] reads as follows: 'Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the manner as if she were unmarried.' It is said that this section authorizes any kind of contracts between husband and wife. We do not think so. Both husband and wife were under such legal disabilities at common law as that they could not contract with each other. To remove the disability of one will not validate the contract, for one of the contracting parties, has no assenting mind; and it would be strange doctrine to announce that, because the disability was removed from one of the contracting parties, the contract is good, although the other is without a contracting mind. The statute undoubtedly has reference to contracts with persons other than her husband." [The court here quotes from and relies upon White v. Wager, 25 N. Y. 328 (1862), post, p. 587.]

Statutes providing that the contract of any married woman shall be valid as if she were sole have been held to confer upon her power to contract with her husband, so that she may sue him. (Roche v. Union Trust Co. [Ind. App.]

WHITE v. WAGER.

(Court of Appeals of New York, 1862. 25 N. Y. 328.)

August 15, 1849, Calista Wager, then being the wife of the defendant, and being the owner of certain real estate, executed and delivered to the defendant her husband, a quitclaim deed purporting to convey to the defendant the said land. The next day Calista departed this life leaving her surviving her said husband and two infant children. The sole question was whether the title to the land passed to the defendant by this deed.

The Supreme Court held that it did not and gave judgment in favor of the plaintiff. The defendant appealed.[7]

DENIO, J. It is an established doctrine of the common law, that, in consequence of the unity of person between husband and wife, neither the husband nor the wife can grant, the one to the other, an estate in possession, reversion or remainder, to take effect in possession during the life time of the grantor. Littleton, § 168; Co. Litt. 3, a, 112, a; Hargrave's note 12, and cases referred to; Bell on Property of Husband and Wife, 470; Firebrass v. Pennant, 2 Wils. 254; Shepard v. Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396; Voorhees v. Presbyterian Church of Amsterdam, 17 Barb. 103, and cases cited by Hand, J.; Simmons v. McElwain, 26 Barb. 419; Dempsey v. Tylee, 3 Duer, 73. There are some exceptions to the rule, not necessary to be adverted to here, but which will be found sufficiently stated in the treatise of Mr. Bell, at the place cited. The rule itself is one of those stubborn mandates of the common law, which requires absolute obedience from the courts, whatever they may think of the justice or equity of its application in a particular case. In the case referred to, from Wilson's Reports, where a provision by a husband for his wife was in question, the judges said they would be glad, if possible, to get over that maxim, of law, that "a husband and wife are one person," and, therefore, cannot grant lands to one another. "But," they said, "we are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as to determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." The reporter adds, that the postea was ordered to be delivered to the defendant, "reluctante tota curia." But it is, nevertheless, a very technical principle; and where the design is for a husband to convey to the wife, it may be evaded, in various ways, as by a feoffment to a third person to the use of the wife, or a covenant with a third party to stand seised to the use of the wife (Bell, ut sup.); or, where the

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52 N. E. 612 [1899]; Hamilton v. Hamilton, 89 Ill. 349 [1878]; Thomas v Mueller, 106 Ill. 36 [1882]), and so that he can enforce the contract against her (Peaks v. Hutchinson, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279 [1902]).

[7] Statement abridged.

wife desires to convey to her husband, the two may join in a conveyance to any one whom they can trust to convey immediately to the husband; and thus the title will be vested in him. Meriam v. Harsen, 2 Barb. Ch. 232.

Thus far, there is no serious controversy between the counsel for the respective parties; but the defendant's counsel insists that, if it be assumed that this conveyance of Mrs. Wager to her husband would be void at common law, the recent statutes respecting married women have changed the rule; and that now a wife may execute a valid conveyance to her husband, notwithstanding their coverture. In examining these statutes, it is necessary to bear in mind that the wife was formerly subject to other disabilities except the want of power to make a conveyance to her husband. At common law, she could not convey to any one except by the expensive and dilatory process of fine and recovery; but afterwards, by statute, she was enabled to execute a valid deed of her lands by joining with her husband, and submitting to an examination to show that she acted without coercion; but she could not devise her lands. As to her capacity to acquire the title to property to her own use, the rule was, that all the personal estate, which she possessed at her marriage, and all which came to her by any title during coverture, even when received as a compensation for her personal services, vested immediately in her husband, unless it was protected by a settlement to her sole and separate use. If she was the owner of land at the time of her marriage, or acquired title to it during coverture, the husband immediately became entitled to the rents and profits of it, and was at once seised of a freehold estate in it. None of these disabilities attached to the condition of a married man, who was as free to receive the title to property, and to dispose of it, after marriage as before, with the single exception that he could not be the grantee of a deed executed by his wife, or make a grant directly to her. As to the world in general, the estate of marriage did not affect his ability to acquire title, to, or to dispose of his property just as he might have done if he had not been married. I except, of course, from this remark, the subject of dower, the inchoate right to which the husband could not dispose of. But it was never supposed that the husband's rights and powers as to property, as affected by the marriage relation, ought to be, or were, susceptible of being increased. The marriage imposed no disability on his part which any one considered a social grievance. On the contrary, the complaint was that his rights were too great, and ought to be diminished. But as to the wife, there came to be a pretty strong sentiment that she was the victim of an oppressive legal system, from which she ought to be relieved.

This was a prominent subject of debate in the Constitutional Convention which sat in 1846; and the substance of the subsequent act of 1848 was at one time incorporated into the project of the new Constitution, but it was finally rejected by a close vote. Debates, by Croswell and Sutton, pp. 55, 116, 794, 795, 811–813. The advocates for a reform as to the legal condition of married women then addressed themselves to the legislature and the result, in the first instance, was the act of 1848 (chapter 200). It constituted the wife the sole proprietor of all the property of both kinds which she should own when she came to be married, and of all which should devolve upon her by any title during the coverture. It attempted to divest rights already vested in her husband under the antecedent law, but as to that it was ineffectual. Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160. But it did not confer upon her the capacity to convey or devise real estate. Wadhams v. American Home Missionary Society, 12 N. Y. 415. This was done by the act of 1849 (chapter 375), which authorized a married woman to convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried. The first mentioned act is entitled, an act for the more effectual protection of the property of married women; and the other is an act to amend the one first mentioned. But independently of this explicit statement of the object of the legislature, it would be quite apparent from the provisions of the acts that the design was, not to confer any additional advantages upon married men, but that it was intended solely for the benefit of the other party to the marriage relation: what is now claimed for the act of 1849, is, that it enables a husband to take a title to realty directly from his wife, contrary to the rule of the common law which has been referred to. We would not expect to find in a law, passed professedly to shield the property of married women from the control of their husbands, a provision making it more easy for the latter to acquire such control.

Beyond all doubt the greatest peril to which the separate estate of the wife is exposed, is her disposition to acquiesce in placing the title to it in the hands of her husband. This the common law prevented to a certain extent by rendering her direct conveyance to him void. I am quite confident that the legislature which passed the acts of 1848 and 1849, would not knowingly have repealed that prohibition in the interest of the husband. If it had been intended to interfere with the doctrine at all, it would have been in the interest of the wife. Now, we know that the common law rule was in the contemplation of the legislature when these statutes were under consideration, for in both of them the power of a feme covert to take property by gift, grant, etc., is limited by the qualifying words, "from any person other than her husband." Thus it will be perceived that they refused to abrogate the rule where the question was respecting conveyances from the husband to the wife, though the disability of the latter to take property to her own use was the evil which it was intended to remedy. The ability of the husband to take property conveyed to him was not at all under consideration, and he was left to such rights in that respect as the antecedent law gave him.

But it is argued that the power in terms given to a married woman, by the act of 1849, "to convey and devise real and personal property," "as if she were unmarried," embraces all manner of conveyances, and necessarily includes any which she might make to her husband. No doubt there was an intention to confer upon the wife the legal capacity of a feme sole, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a feme sole, there being no person to whom, in respect to conveyances as made by her, the rule of the common law could apply. By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she were not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience. Corporations cannot, in general, take title to lands by will. The removing of the disabilities of femes covert would not allow them to make a devise to a corporation not authorized to take. It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of the wife, must be removed; but, as has been remarked, there is no language in these acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which he labored.

Upon the whole, I am of opinion that the acts of 1848 and 1849 have no influence upon the case, and that the principle which renders direct conveyances between husband and wife void, applies to her deed under which the defendant claimed title to the premises in question.

I agree, also, with the Supreme Court, that the defective conveyance cannot be aided by the application of equitable principles. It was wholly without consideration, and in such cases equity does not interfere. See the cases cited in Shepard v. Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396.

The judgment of the Supreme Court must be affirmed.

WRIGHT and SMITH, JJ., dissented.

Judgment affirmed.

SAVAGE v. SAVAGE.

(Supreme Judicial Court of Maine, 1888. 80 Me. 472, 15 Atl. 43.)

LIBBEY, J. Both parties claim the land in controversy under Hannah Savage, who, it is admitted, was the owner January 24, 1880. The plaintiff claims as devisee under the will of said Hannah, who died December 9, 1886. No question is raised as to the validity of the will; and if she held the title at her death the plaintiff must prevail.

The defendant claims that said Hannah conveyed her title to David Savage, her husband, January 24, 1880, and that he conveyed to her, September 1, 1885.

The plaintiff contests the validity of the deed from Hannah Savage to David Savage on two grounds: (1) That when said deed was executed a married woman had no power to convey her lands to her husband. (2) That the deed was obtained by duress.

1. Prior to the act of 1847, c. 27, husband and wife could not contract with each other, because at common law from their legal union they were regarded as one person so far as their power to contract with each other was involved; but by that act the husband was clothed with power to convey his real, or personal estate directly to his wife. Johnson v. Stillings, 35 Me. 427.

By the act of 1852, c. 227, the wife was empowered to convey her real, or personal estate directly to her husband; not in direct terms, but as a result of the power given her to convey her estate "as if she were unmarried." Allen v. Hooper, 50 Me. 371. If the legal meaning of the act of 1852, has not been changed by the legislature since its passage, Allen v. Hooper, is conclusive as to the power of Hannah Savage to convey directly to her husband.

In the Rev. St. of 1857, c. 61, § 1, the words used in the act of 1852, giving a married woman the power to convey or devise her real, or personal estate "as if she were unmarried," were changed to "as if sole." This did not change the meaning at all. By act of 1861, chapter 46 (Rev. St. 1857, c. 61, § 1) was amended by striking out the words "as if sole, and," so that it reads as follows: "Section 1. A married woman of any age, may own in her own right, real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the joinder or assent of her husband."

It is claimed by the learned counsel for the defendant that this change in the terms of the statute was intended by the legislature to restore the unity, or oneness of husband and wife, so that the wife could no longer convey her lands directly to her husband. If so it would seem to restore their common law relation so that the husband could not convey to the wife; but there is no change in the terms of the statute construed by the court as giving that power in Johnson v. Stillings, supra, and the statute still recognizes the authority of the husband to convey directly to the wife, and, in such case declares she shall not convey "without the joinder of her husband in such conveyance."

It is not necessary to determine the intention of the legislature in the amendment of 1861; but it may be found in the act of 1857, c. 8, which provides that, "when a husband waives a provision made for him in the will of his deceased wife, her estate being solvent, and in all cases where she dies intestate and solvent, he shall be entitled to an allowance from her personal estate, and a distributive share in the residue thereof, in the same manner as a widow is in the estate of her husband; and if she leaves issue he shall have the use of one-third; if no issue, of one-half of her real estate, for his life, to be recovered and assigned in the manner and with the rights of dower." It may have been supposed that this act was inconsistent with Rev. St. 1857, c. 61, § 1, giving the wife power to devise her lands "as if sole" and the amendment of 1861, striking out the words above quoted, was made to bring the two statutes into harmony. No other intention is perceived.

By the Revised Statutes of 1871, which were in force when the deed in contention was made, no change was made in these statutes in respect to the question involved here, and we have no doubt Hannah Savage had legal power to convey her lands directly to her husband, when she executed the deed to him.

[The court then held that the jury were properly instructed on the question of duress.]

Exceptions and motion overruled.[8]

PETERS, C. J., and WALTON, VIRGIN, FOSTER, and HASKELL, JJ., concurred.

WELLS v. CAYWOOD.

(Supreme Court of Colorado, 1877. 3 Colo. 487.)

THATCHER, C. J. This was an action of ejectment brought by the appellee against the appellant in the court below. On the 11th day of August, 1873, Albert W. Benson being at the time the owner in fee of the premises in dispute, made a promissory note for the sum of $250, payable to Catherine D. Caywood, the wife of William W. Caywood, two years after the date thereof. On the same date, to secure the payment of this note, Mr. Benson conveyed to William W. Caywood, as trustee, the disputed premises, with power to sell and dispose of the same at public auction in the manner prescribed in said deed of trust, in case the grantor therein should make default in the payment of the promissory note, or any part thereof, or the interest thereon, and to make, execute and deliver to the purchaser, at such sale, a good and sufficient deed of conveyance for the premises sold. After the maturity of the note, Mr. Benson having made default in its payment, the trustee advertised and sold and conveyed the premises to Mrs. Caywood, the then holder of the note. The deed of trust and the note were offered and read in evidence without objection. To the admission of the trustee's deed from Mr. to Mrs. Caywood, counsel for defendant in the lower court objected, on the sole ground that it was a deed executed by a husband to his wife. This objection was overruled, the deed admitted in evidence and an exception taken. The admission of the deed in evidence is assigned for error.

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[8] Accord: Despain v. Wagner, 163 Ill. 598, 45 N. E. 129 (1896); Noel v. Fitzpatrick, 124 Ky. 787, 100 S. W. 321, 30 Ky. Law Rep. 1011 (1907).

When the power of disposal is by statute confined to the married woman's separate estate, she may in accordance with the principal case convey direct to her husband when she conveys her separate statutory legal estate. Vick v. Gower, 92 Tenn. 391, 21 S. W. 677 (1893). But not when her general estate is involved. In the latter case the formality of the husband joining and her separate examination provided for by statute in the case of the conveyance by a married woman of her general estate are not complied with. Giffin v. Giffin (Tenn. Ch.) 37 S. W. 710 (1896); Worrell v. Drake, 110 Tenn. 303, 75 S. W. 1015 (1903).

[Part of opinion relating to common-law rules applicable to conveyances between husband and wife omitted.]

By "an act concerning married women," approved February 12, 1874, it is provided in section 1, that any woman, while married, may bargain, sell and convey real and personal property, and enter into any contract in reference to the same, as if she were sole. Section 2 provides that she may sue and be sued, in all matters the same as if she was sole. Section 3 provides that she may contract debts in her own name, and upon her own credit, and may execute promissory notes, bonds and bills of exchange, and other instruments in writing, and may enter into any contract the same as if she were sole. Section 4 repeals section 17 of chapter 17 of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate. This is, essentially, an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. It confers, in terms, enlarged rights and powers upon married women. In contemplation of this statute, whatever may be the actual fact, a feme covert is no longer sub potestate viri in respect to the acquisition, enjoyment and disposition of real and personal property. This statute asserts her individuality, and emancipates her, in the respects within its purview, from the condition of thraldom in which she was placed by the common law. The legal theoretical unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property she, as any other individual who is sui juris, can do what she will, without reference to any restraints or disabilities of coverture. Whatever incidents, privileges and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute her right to convey was not untrammeled, but now it is absolute without any qualification or limitation as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them.

When a right is conferred on an individual, the court cannot, without transcending its legitimate functions, hamper its exercise by imposing limitations and restrictions not found in the act conferring it. Were we to construe this enabling statute so as to deprive the wife of the right to elect to whom she will convey her property, we would it is believed thwart the legislative will whose wisdom we, as a court, are not permitted to question. The disability of husband and wife to contract with and convey to each other was, at common law, correlated and founded mainly upon the same principle, viz.: The unity of baron and femme. The removal in respect to the wife, of a disability that is mutual and springing from the same source, removes it also as to the husband.

The reason, which is the spirit and soul of the law, cannot apply to the husband as it no longer applies to the wife. If she may convey to the husband, the husband may convey to the wife. Allen v. Hooper, 50 Me. 371; Stone v. Gazzam, 46 Ala. 269; Burdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225; Patten v. Patten, 75 Ill. 446.[9]

Perhaps the right of the husband when acting in a representative capacity in autre droit to make a deed to his wife might be supported at common law. Co. Litt. 112 a, 187 b; Com. Digest, Baron and Femme, D, 1. This doctrine, however is repudiated in New York (Leitch v. Wells, 48 Barb. 654), but sanctioned in Pennsylvania (Dundas' Appeal, 64 Pa. 332).

We, however, rest our decision, not upon this mooted doctrine, but broadly upon the statute, under which a husband, when acting not in a representative capacity, but in his own right, has, as we have seen, the right to convey directly to the wife.

But it may be urged that if by reason of the disability of coverture, then by reason of the peculiarly intimate relation of husband and wife, and the consequent opportunity to commit and conceal fraud, the same principle that prohibits a trustee from executing a trust in favor of himself, also prohibits him from executing it in favor of his wife. This position is not without force. Dundas' Appeal, 64 Pa. 332. It must, however, be borne in mind, that it is only in the absence of an express or a clearly implied agreement that the law, suspicious of fraud and collusion where a fiduciary relation exists, will not permit a trustee to become either directly or indirectly a purchaser at his own sale; but where the right to purchase is conferred in clear terms by the instrument appointing him, or where, as in the case before us, the wife as the holder of the note is in unmistakable language authorized to buy at the trustees' sale, the law interposes no impediment to the validity of a sale so made. Perry on Trust, 602, v; Dundas' Appeal, case cited supra, is precisely in point.

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[9] Accord: Burdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225 (1866); Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983 (1891); Luttrell v. Boggs, 168 Ill. 361, 48 N. E. 171 (1897).

[Balance of opinion relating to other points omitted.]

Affirmed.

LOUISVILLE & N. R. CO. v. ALEXANDER.

(Court of Appeals of Kentucky, 1894. 27 S. W. 981, 16 Ky. Law Rep. 306.)

Action by the Louisville & Nashville Railroad Company against Mary E. Alexander. Judgment for defendant. Plaintiff appeals.

HAZELRIGG, J.[10] The principal question involved on this appeal is whether or not a married woman who has been empowered to trade as a single woman may form a business partnership with her husband, by reason of which she may be made liable for the partnership debt. It is insisted by the appellee that such a partnership cannot be created; that the statute only enlarges the powers of a married woman as to others than her husband. The case of Kalfus v. Kalfus, 92 Ky. 542, 18 S. W. 366, 13 Ky. Law Rep. 763, is relied on as supporting this contention. It will be noticed, however, that that case was one in which only the rights of the husband and the wife, as between themselves, were involved; and it was held that the same reciprocal obligations, rights, and duties pertaining to the marriage relation existed as if no such power had been conferred on the wife. But in the case at bar the wife deals with a stranger, and why is she less bound by her contract because she contracts jointly with her husband? She may become the surety of the husband (Sypert v. Harrison, 88 Ky. 465, 11 S. W. 435, 10 Ky. Law Rep. 1052; Hart v. Grigsby, 14 Bush, 542), and we perceive no reason why she may not become a joint obligor with her husband. She cannot say to the world, "I am interested in this business venture with my husband, and my property is therefore pledged to the payment of partnership debts," and then escape liability on the plea that the peace and quiet of domestic life render it impolitic for husbands and wives to form such business relations. These considerations cannot be allowed to affect strangers, and the property rights of the parties are not here involved. * * *

Judgment reversed for proceedings in conformity herewith.[11]

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[10] Part of the opinion is omitted.

[11] Accord: Lane v. Bishop & Co., 65 Vt. 575, 27 Atl. 499 (1893). But see Board of Trade v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pa. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919 (1882).

VALIDITY OF TRANSACTIONS BETWEEN HUSBAND AND WIFE AS AGAINST THE HUSBAND'S CREDITORS.—This is left principally to treatment in connection with conveyances in fraud of creditors, dealt with elsewhere in this series of casebooks. The following points may with propriety he here noted:

A prima facie inference of fact that property purchased by the wife was so purchased with the property of the husband, which he gave to her, exists even after married women's legislation, which gives to the wife her legal separate estate. Hence, in a suit by the creditor of the husband to subject the property in the name of the wife to the husband's debts, the burden of going forward with evidence in the first instance is upon the wife to show that the property was purchased with her own separate estate. Winter v. Walter, 37 Pa. 155 (1860); Murdoch v. Baker, 46 W. Va. 78, 32 S. E. 1009 (1899); Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89 (1902).

It seems that, since a man's creditors cannot reach the value of his labor or personal services, he may give these as he pleases to his wife for the benefit of her separate estate. Garvin v. Gaebe, Adm'r, 72 Ill. 447 (1874); Bongard v. Core, 82 Ill. 19 (1876); Alsdurf v. Williams, 196 Ill. 244, 63 N. E. 686 (1902); Nance v. Nance, 84 Ala. 375, 4 South. 699, 5 Am. St. Rep. 378 (1887); Mayers v. Kaiser, 85 Wis. 382, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. Rep. 849 (1893); Arnold v. Talcott, 55 N. J. Eq. 519, 37 Atl. 891 (1896); Hibbard v. Heckart, 88 Mo. App. 544 (1901); Sharp v. Fitzhugh, 75 S. W. 562, 88 S. W. 929 (1905). But it is essential that the services be in reality given for the wife's separate estate, and that her property be not in fact loaned to the husband to conduct his own business with. In the latter case the increase at least may be reached by the creditor as the husband's property. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703 (1904); Pease v. Barkowsky, 67 Ill. App. 274 (1896); Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98 (1866); Boggess v. Richards, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938 (1894).

If the husband puts his own personal property into improvements upon his wife's real estate, so that the title passes to the wife by the annexation of the husband's chattels to the realty, then if the intent to deprive the husband's creditors exists on the part of the husband alone, and the wife is a mere passive and innocent recipient of the favor, it has been held that the husband's creditors can nevertheless reach the loan to the extent of its enhanced value by reason of the improvements, not to exceed the value of the property put in. Caswell v. Hill, 47 N. H. 407 (1867); Morris v. Fletcher, 67 Ark. 105, 56 S. W. 1072, 77 Am. St. Rep. 87 (1899); Ware v. Hamilton Shoe Co., 92 Ala. 145, 9 South. 136 (1890); Administrator of Smith v. Poythress, 2 Fla. 92, 48 Am. Dec. 176 (1848); Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 376 (1870); Hancock v. Adams, 87 Ky. 417, 9 S. W. 246, 10 Ky. Law Rep. 371 (1888). Contra: Corning v. Fowler, 24 Iowa, 584 (1868); McFerrin v. Carter, 3 Baxt. (Tenn.) 335 (1874).

If, however, the act of the husband is not in fraud of creditors, so far as he is concerned the creditor has no standing to secure payment out of the wife's real estate. Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632 (1860).

CHAPTER XV

CIVIL AND CRIMINAL RESPONSIBILITY OF ONE SPOUSE FOR TORTIOUS DAMAGE TO THE PERSON OR PROPERTY OF THE OTHER—HUSBAND'S RIGHT TO THE CUSTODY OF HIS WIFE, AND VICE VERSA

MINIER v. MINIER.

(Supreme Court of New York, 1871. 4 Lans. 421.)

PARKER, J. This action, which before the Code would have been called ejectment, is brought by the plaintiff against the defendant, who is her husband, to recover possession of a house and lot in the city of Elmira, together with damages for the wrongful withholding of the same.

The issues having been referred by consent of parties, the referee found for the plaintiff, and judgment was entered upon his report, from which the defendant appeals.

The principal question in the case is whether the wife can maintain such action against her husband.

Unless such right is given to her by the statute of 1860, "concerning the rights and liabilities of husband and wife (Session Laws 1860, c. 90), as amended in 1862 (Session Laws 1862, c. 172), it is clear that no such action can be maintained.

Section 3 of the act of 1862 provides as follows: "Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase or the gift or grant of any person in the same manner as if she was sole." The terms of this provision are sufficient to warrant the bringing of such a suit both by a wife against her husband, and by a husband against his wife, and I am inclined to think that such a suit is also within the spirit and intent of the act. In view of the main object of the series of statutes in respect to the property and rights of married women, to wit, the more effectual protection thereof, and in respect to the separate property of the wife, its protection from the "interference and control" of the husband, as expressed in the first section of the act of 1860, it is both logical and reasonable, I think, to construe the authority given her in section three of the amending act of 1862, to sue in "all matters having relation to her sole and separate property * * * as if she were sole," as entitling her to bring just such a suit against her husband in relation to her property as she may bring against any other person. I see nothing in the relation between husband and wife any more inconsistent with such a construction than with the right of the wife to sue her husband in equity, as she could do, before the statute. Dyett v. N. A. Coal Co., 20 Wend. 573, 32 Am. Dec. 598; Martin v. Martin, 1 N. Y. 473. And when she has the legal title to real estate which her husband actually occupies exclusively of herself, the proper action for its recovery is not a suit in equity, but an action at law. In regard to the property, the relation of husband and wife does not affect it; as to it the parties are strangers to each other. If any other person than the husband were occupying it, as he did, no doubt would exist as to the propriety of the action brought. Since the husband and wife occupy the same relation to the property as the parties in the case supposed, there can be no good reason for refusing to construe the statute according to its letter, since such construction seems so plainly within its object and intent.

The same section (3) above referred to, also authorizes a married woman to "bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole," and then provides that "the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property." It has been decided in this court that under this clause of the statute a married woman cannot maintain an action against her husband for slander (Freethy v. Freethy, 42 Barb. 642), nor for assault and battery (Longendyke v. Longendyke, 44 Barb. 366). There are reasons against construing the statute as authorizing such actions between husband and wife, which do not exist in respect to actions relating to property. Before the statute the damages arising from injuries to the person or character of the wife were to be sued for by the husband and wife, and when recovered belonged to the husband, and this statute was evidently intended to change the law in that respect, and allow the wife to sue for, and recover them for herself. This is shown by the latter clause of the provision above cited, to be the scope and intent thereof, and, inasmuch as the evident object of the provision is thus satisfied, it was well held that it was intended thereby to open the door to a spirit of litigation between husband and wife so manifestly against public policy, and at war with domestic peace as would be the right then in question. But these reasons do not apply to the case at bar, the action in which seems, as already shown, to be within the intent of the statute, and being only an action at law instead of a suit in equity, which might before have been brought, gives no new opportunity for litigation, is not against public policy, which already allows and provides for suits in regard to the property between husband and wife; and is fraught with no such disastrous consequences to domestic peace and concord.

Another distinction between the two classes of cases is, that while, in regard to injuries to the person and character of the wife, she is allowed to sue for them as if she were sole, no provision is made by which the husband can maintain an action against the wife for such injuries. This want of mutual right, which right in regard to property exists, is a strong reason for believing that the former rule of law against the right of husband and wife to sue each other for such moneys, was not intended to be interfered with. The decisions above cited upon this question cannot, therefore, be regarded as authorities in favor of the defendant. The terms and spirit of the statutes by which married women are invested with the same rights, in respect to their sole and separate property as though they were sole, should be carried out by such construction as will make them effectual, by allowing the wife the same remedies against her husband, as, in like cases, would be appropriate against other persons.

[Balance of opinion omitted.]

Judgment affirmed.

SMITH v. SMITH.

(Supreme Court of Rhode Island, 1898. 20 R. I. 556, 40 Atl. 417.)

Trover by a wife against her husband for his conversion of her personal estate. Heard on defendant's petition for a new trial.

MATTESON, C. J. This is an action of trover for the conversion of certain articles of household furniture and other goods, brought by the plaintiff, a married woman, against her husband. At the trial in the common pleas division a verdict was rendered in favor of the plaintiff. The case is now before us on the defendant's petition for a new trial, alleging that the court erred in its refusal to instruct the jury that the plaintiff could not maintain the action because at the time of the alleged taking of the goods she was the defendant's wife, to which refusal exception was duly taken. The other ground of the petition was not insisted on at the hearing.

An examination of Gen. Laws R. I. c. 194, "Of the Property Rights of Married Women," and Pub. Laws R. I. 1896–97, c. 335, in amendment of chapter 194, shows that the policy of the statute is to give to married women the entire control of their own property, free from any control or interference of their husbands, and to place them in that respect on the same footing as single women in the management of their property. Chapter 194, § 16, provides that "in all actions, suits and proceedings whether at law or in equity, by or against a married woman, she shall sue and be sued alone." We see no reason, therefore, why a married woman might not maintain an action against her husband for the conversion of her property as well as against another person for a like conversion. Our opinion is that the common pleas division did not err in its refusal to instruct the jury in accordance with the defendant's request.

New trial denied, and case remitted to the common pleas division with direction to enter judgment on the verdict.

BERDELL v. PARKHURST.

(Supreme Court of New York, Second Department, 1879. 19 Hun, 358.)

BARNARD, P. J. The plaintiff, at the time of the taking of the property in question, was the husband of the defendant, Harriet B. Berdell. She left her husband's house and took with her therefrom certain personal property of very considerable value. The plaintiff brought this action to recover its value against six persons. The action failed as to four, by consent of the plaintiff upon the trial. The court dismissed the complaint as to the defendant Parkhurst, because there was no proof making out a cause of action against her, and as to the defendant Berdell, because the action would not lie against the wife for the wrongful taking. As to Mrs. Parkhurst, I think the ruling was right.

[Remainder of opinion on this point omitted.]

As to the other questions, presented by this appeal, the law is in a very unsatisfactory state. The plaintiff is entitled to own property, and so is his wife. He can bring an action for a conversion against anyone who violates his right to have and possess his own property, unless his wife be a person excepted by the relation of husband and wife. She has the same right of action against all trespassers, unless her husband be the sole exception. It has been decided, that a wife may not sue her husband for slander, nor for assault and battery, nor for wages. Freethy v. Freethy, 42 Barb. 642; Longendyke v. Longendyke, 44 Barb. 366; Perkins v. Perkins, 62 Barb. 531; Shuttleworth v. Winter, 55 N. Y. 625. The Court of Appeals held that a wife did not become liable to answer her husband's administrators for the proceeds of property disposed of by the wife, without right in the life-time of her husband, when the property was entrusted to the wife, by the husband, for management and control. On the other hand, it has been held, that a wife could sue the husband for a conversion of her property. Some question is made, whether an action at law could be brought, but there is no doubt that a complaint which stated a conversion stated a cause of action, and that the proper relief should be given, even though it was not asked for in the complaint. Whitney v. Whitney, 3 Abb. Prac. (N. S.) 350. This court has, in a late case, decided that a wife may sue her husband in ejectment to recover the possession of her property, which was wrongfully detained from her by her husband.

We upheld the action, upon the ground that whoever owned property, and was entitled to its possession, could recover it at law against any wrong-doer, including her husband. The same principle should govern this case. The evidence showed more than a mismanagement of property entrusted to the wife by the husband. It showed a tortious taking. A forcible seizure and carrying away under a claim that she owned it and that the husband did not. If he cannot challenge her act in a court of law, and recover his property, if it shall be adjudged to be his property, he has not perfect protection, in the enjoyment of his property, under the law. We deem his right of action to be clear against his wife, if she has wrongfully taken his property under a claim that it is her separate estate.

The judgment as to Mrs. Parkhurst should be affirmed, with costs, and reversed as to Mrs. Berdell, with costs to abide event.

PRATT, J., concurred. DYKMAN, J., not sitting.

Judgment affirmed as to Eliza W. Parkhurst, reversed as to Harriet B. Berdell, and new trial granted as to her, costs to abide event.

THE QUEEN v. KENNY.

(Queen's Bench Division, Court for Crown Cases Reserved, 1877. L. R. 2 Q. B. D. 307.)

The defendant was indicted for feloniously receiving stolen chattels. It appeared that the chattels were taken by the wife from her husband. The jury found the prisoner guilty of feloniously receiving, and the recorder postponed the sentence until the opinion of the Court for the consideration of Crown Cases Reserved could be taken.[1]

KELLY, C. B. This conviction cannot be sustained. Husband and wife are one person in law, and the wife cannot steal her husband's goods, whether she has committed adultery or not. There is a class of cases in which the question of adultery is very material. Where the adulterer, acting in concert with the wife, takes the husband's goods, the fact of adultery, if established, by revoking the wife's authority to dispose of her husband's goods, may make that larceny on the part of the adulterer which otherwise would not have been so. But here the prisoner has not been convicted of stealing, and probably the facts would not have supported such a conviction. He has been convicted of receiving, and that conviction cannot be sustained without proof of a stealing by some other person. There is no evidence of any such stealing.

MELLOR, LUSH, and DENMAN, JJ., and HUDDLESTON, B., concurred.

Conviction quashed.[2]

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[1] Statement abridged.

[2] In Thomas v. Thomas, 51 Ill. 162, 164 (1869), the court, by Mr. Justice Walker, said: "And on the charge of larceny the evidence equally fails. It is proved that she took a watch and disposed of it so that it could not be found. Whose watch? Was it her watch, or did it belong to some one else? If it was her own, under the law of 1861, called the 'Married Women's Law,' she had a right to dispose of it without the consent, or even the knowledge, of the husband. The law gives her that right, and if she exercises it, however injudiciously, there is no ground of legal complaint on the part of the husband. Again, if it belonged to the husband, it could not, even under the law, be held larceny. That act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability, if any, it is not larceny."

BEASLEY v. STATE.

(Supreme Court of Indiana, 1894. 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418.)

Alfred D. Beasley was charged by indictment with the larceny of money and a watch, the goods and chattels of his wife. A motion to quash the indictment was overruled and exceptions preserved by him. He was found guilty. Motion for new trial was overruled and judgment rendered, from which this appeal is prosecuted.

DAILEY, J.[3] [after finding that the verdict was sustained by the evidence, and stating the substance of the married women's legislation in Indiana, and the common-law rule about the unity of husband and wife, continued as follows:]

The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts and doing whatever a feme sole might do; and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficient statutes, a woman may hold her own property; make her own money; enter into her own contracts; pay her own debts. She may even contract with her own husband. If he defrauds her she may recover. If a woman may contract, under these statutes, with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that if performed by another it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them.

In Garrett v. State, 109 Ind. 527, 10 N. E. 570, the defendant was indicted for burning the property of "another person," to wit: The property of Hannah Garrett. The evidence showed that he and his wife Hannah, the owner of the dwelling house so destroyed, occupied, used, and dwelt therein, as their habitation, and yet this court said: "If a man unlawfully, feloniously, willfully and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute."

Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and if the husband can commit the crime of arson against her private property it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods.

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[3] Statement abridged and part of opinion omitted.

In our opinion the judgment of the trial court should be, and it is, affirmed.

ABBOTT v. ABBOTT.

(Supreme Judicial Court of Maine, 1877. 67 Me. 304, 24 Am. Rep. 27.)

PETERS, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sustained by her former husband? We have no doubt, that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision is grounded meet with our unqualified approval. Phillips v. Barnet, 1 Q. B. D. 436. It is there held that a wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, Lush, J., says: "Now I cannot for a moment think that a divorce makes a marriage void ab initio; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case." Field, J., says: "I now think it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person." And Blackburn, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest authorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her as a punishment for her misconduct, and her only remedy was, that "she hath retaliation to beat him again if she dare." And Chancellor Kent lays down the doctrine not contradicted or challenged in any of the editions of his Commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent, Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American states that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of Commonwealth v. Barry, in 2 Green's Cr. Law Reports, 286. Still, the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other. As said by Settle, J., in State v. Oliver, 70 N. C. 60: "It is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of habeas corpus, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way, all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run.

With divorces as common as they are nowadays, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations, to be wise and salutary and to stand on the solid foundations of the law.[4]

The plaintiff invokes the case of Blake v. Blake, 64 Me. 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterwards. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the co-defendants are liable in this action. We think it follows from the previous reasoning that they are not.[5] The true test as to their liability is whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the jury was ad damnum ipsorum. She cannot, at common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can effect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, c. 112. The damages recoverable in an action would have belonged to him and not to her. And, at the same time, if she had committed a tort, he would have been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his lifetime; and undoubtedly the same right follows after a divorce a vinculo matrimonii. But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. Norcross v. Stuart, 50 Me. 87; Marshall v. Oakes, 51 Me. 308; Ballard v. Russell, 33 Me. 196, 54 Am. Dec. 620; Laughlin v. Eaton, 54 Me. 156; West v. Jordan, 62 Me. 484; Hasbrouck v. Weaver, 10 Johns. (N. Y.) 247; Snyder v. Sponable, 1 Hill (N. Y.) 567; Bacon, Abr. Baron and Feme, K; Shaddock v. Clifton, 22 Wis. 114, 94 Am. Dec. 588.

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[4] Accord: Nickerson v. Nickerson, 65 Tex. 281 (1886); Main v. Main, 46 Ill. App. 106 (1892).

[5] See, however, Nickerson v. Nickerson, 65 Tex. 281 (1886).

Plaintiff nonsuit.

APPLETON, C. J., and WALTON, DICKERSON, and VIRGIN, JJ., concurred. BARROWS, J., concurred in the result.

PETERS v. PETERS.

(Supreme Court of Iowa, 1875. 42 Iowa, 182.)

The plaintiff alleges that she is the wife of the defendant and claims damages of the defendant for eleven distinct assaults and batteries at various times while she and the defendant were husband and wife. The defendant demurred. The demurrer was sustained and the plaintiff appeals.[6]

DAY, J. If this action can be maintained, it is because of the provisions of our statute.

Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture.

The sections of the Code mainly relied upon by appellant for the accomplishment of the results which, it is claimed, have been effected, are 2204 and 2211.

Section 2211 is as follows: "A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried."

The following is section 2204: "Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

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[6] Statement abridged.

It is evident that section 2211 refers to and authorizes actions against parties other than the husband; for if this section allows an action generally against the husband, it covers and embraces more than is included in section 2204, and that section is rendered useless and meaningless. Whatever right of action exists against the husband must, therefore, be found in section 2204. This section is limited to actions for property or rights growing out of the same. But in this connection appellant cites Musselman v. Galligher, 32 Iowa, 383, which approves Chicago, Burlington & Quincy R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606, holding that a right to sue for an injury is property, and that where this right of action exists in favor of the wife, it is her property, for which she may sue. It is claimed that, from this decision and the section above quoted, the right to maintain this action necessarily follows. But it is quite evident that this course of reasoning assumes the very thing to be established. Section 2204 authorizes the wife to maintain an action against her husband for the recovery of her property; and Musselman v. Galligher recognizes the doctrine that when a right to sue for an injury exists, that right is property. Before any conclusion favorable to the appellant can be drawn from these premises, the right of the wife to maintain an action against the husband for a tort must be either admitted or assumed. In other words, the argument involves the admission or assumption of the thing undertaken to be proved. The argument, fully expressed, is as follows: The wife may sue the husband for her property; when a right exists to sue for a tort, that right is property; the right of the wife to sue the husband for a tort exists; therefore the wife may maintain an action against the husband for a tort; or, the wife may sue the husband for a tort, because the wife has a right to sue the husband for a tort.

We are satisfied that the statute contains no provisions which authorize this action, and that the demurrer was properly sustained.

Affirmed.[7]

STROM v. STROM.

(Supreme Court of Minnesota, 1906. 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. [N. S.] 191, 116 Am. St. Rep. 387.)

Start, C. J. This is an action to recover damages for personal injuries alleged to have been received by the plaintiff by reason of an assault alleged to have been committed upon her by the defendant on April 11, 1905. The answer denied the assault, and, as a second defense, alleged that at the time of the alleged assault the plaintiff and the defendant were husband and wife living together as such; and as a third defense it alleged a judgment dissolving the marriage of the parties at the suit of the plaintiff on account of the alleged assault, and awarding to her permanent alimony in the sum of $5,100 which the defendant paid. The plaintiff demurred to the second and third defenses on the ground that the same do not state facts sufficient to constitute a defense. The trial court made its order overruling the demurrer from which the plaintiff appealed.

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[7] Accord: Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589 (1883); Main v. Main, 46 Ill. App. 106 (1892); Longendyke v. Longendyke, 44 Barb. (N. Y.) 366 (1863).

The sole question for our decision is: Can a wife maintain a civil action against her husband for a personal tort committed by him against her during coverture? It is the contention of the plaintiff that she can by virtue of Gen. St. 1894, § 5530, which reads as follows: "That from and after the passage of this act, women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does, as a man; and for any injuries sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal, in her own name alone, to the courts of law or equity, for redress and protection that her husband has to appear in his name alone; provided, this act shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law."

This statute gives to a married woman the same right of action in her own name for any injuries sustained to her reputation, person, or property as her husband has in his own name to maintain an action for like injuries sustained by him, and no other or greater right. The purpose of the statute was to place the husband and wife on an equality as to actions by either for injuries to person, reputation or property. The husband cannot and never could bring an action against his wife for a personal tort committed by her against him during coverture. It follows that the statute does not authorize her to bring an action against him for a personal tort committed by him against her during coverture for her rights in this respect are expressly limited by the statute to the rights which the law gives to him. The statute authorizes a married woman to maintain an action in her own name against her husband or any one else for injuries to her property or to her person except that she cannot maintain a civil action against her husband for a personal tort committed by him against her during coverture. Nor can he maintain a similar action against her. The disabilities in this respect are mutual.

Counsel for plaintiff, however, urges that the right to maintain an action for a personal tort is a property right, hence it falls within the express terms of the statute. But as we have stated the right of a married woman to maintain an action against her husband for a personal tort is not given by the statute. There being no right of action in this respect it follows of necessity that there is no property right to protect. See Peters v. Peters, 42 Iowa, 182.

The demurrer was properly overruled.

Order affirmed.[8]

FULGHAM v. STATE.

(Supreme Court of Alabama, 1871. 46 Ala. 143.)

Appeal from Circuit Court of Greene.

Tried before Hon. Charles Pelham.

This was an indictment of the husband for an assault and battery upon his wife. The indictment charges that before the finding thereof, "George Fulgham assaulted and beat his wife, Matilda Fulgham, against the peace," etc. Appellant went to trial on plea of not guilty, and was convicted and fined.

From the bill of exceptions, it appears that the accused was chastising one of his children, when the wife remonstrated, thinking the punishment excessive. The child ran, pursued by the father, and both followed up by the wife. When the wife came up with her husband, he struck her twice on the back with a board, and she returned the blows with a switch. The blows inflicted on the wife made no permanent impression. Both were high tempered, and were emancipated slaves, and were husband and wife.

This being all the evidence, the court charged the jury that "if they believed that defendant struck his wife with a board, as described in the evidence, in anger, and not in self-defense, he was guilty of an assault and battery; that words of provocation and abuse by the wife, if she used any at the time of the fight, would, under the statute of Alabama, be in justification or extenuation, as they might see fit." The defendant excepted to this charge, and requested the court to charge the jury that "a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness." This charge the court refused to give, and "further charged that the proposition that a husband could moderately chastise his wife, was a relic of barbarism, and no part of the law of Alabama, although it might be of North Carolina or Mississippi. To the refusal to give the charge asked, and to the remark above, defendant excepted."

The charges given, and the refusal to give the charge asked, are now assigned as error.

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[8] Accord: Schultz v. Schultz, 89 N. Y. 644 (1882), reversing a judgment in support of the action by the wife in the Appellate Division of the Supreme Court, reported in 27 Hun, 26 (1882); Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25 (1897).

PETERS, J. This is a criminal prosecution by indictment upon a charge of assault and battery by the husband upon the person of the wife. The defense relied on by the accused is, that a husband may give his wife moderate correction in order to secure her obedience to his just commands.

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone, or as he says, "in the polite reign of Charles the Second," except among "the lower rank of the people, who were always fond of the old common law," by which "they claim and exert their ancient privilege" to give their wives "moderate correction," to secure subordination in the family. 4 Bl. Com. 444, 445, marg. page. It will be seen from this reference, that this eminent and classic commentator on the law of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people—of those of the higher as well as those of the lower rank. The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws can not be enforced in this State. The law for one rank is the law for all ranks of the people, without regard to station. Judge Blackstone calls it merely an ancient privilege, and quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law. This distinguished author published his Commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here. If it was, the offense of witchcraft and sorcery, which were crimes at common law, and most cruelly punished against the voice of both reason and religion, might be indicted here. 4 Bl. Com. p. 60. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. Turner v. Turner, 44 Ala. 437; Goodrich v. Goodrich, 44 Ala. 670; Moyler v. Moyler, 11 Ala. 620; Saunders v. Saunders, 1 Rob. Ec. R. 549. The husband may defend himself, his children, and those relations whom the law permits him to defend, against the violence of the wife. 12 Ala. 587; 1 Bish. Cr. Law, 341. But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of the laws. Her sex does not degrade her below the rank of the highest in the commonwealth.

Speaking of the duty of the husband to the wife, a late expounder of the law of this great relation declares that he "is bound to love his wife and to bear with her faults, and if possible, by mild means to correct them." Schouler, Dom. Rel. 59; 1 Bouv. Law Dict. 675, Husband; Goodrich v. Goodrich, 44 Ala. 670. This is the voice of the law, and the voice of politeness and humanity, and I think also the voice of religion, which is, after all, but pure and disinterested love. St. Paul's Epists. ad Corinths., ubique.

Besides this, the constitution has wisely and justly extended the protective power of the State to all its people alike. Its shield is stretched out over the high and the low, and the rich and the poor, the strong and the weak, the wise and the simple, the learned and the unlearned, and the good and the bad, without distinction of rank, caste or sex. All stand upon the same footing before the law, "as citizens of Alabama, possessing equal civil and political rights and public privileges." And no special "privilege" to any rank of the people is allowed to exist in this State, because such a privilege is forbidden by the fundamental law. Const. Ala. 1867, art. 1, §§ 2, 32; Dale v. Governor, 3 Stew. 387. I therefore think that the common law of "wife-whipping" among "the lower rank of people" in Great Britain has never been the common law of this State. It is, at best, but a low and and barbarous custom, and never was a law.

The husband may exercise over the wife "gentle restraint." 2 Kent, 181. And he may have security of the peace against the wife, and the wife against him. 4 Bla. Com. 445. And they may be indicted for assault and battery upon each other. Bradley v. The State, Walker R. 156. But beyond this, "the rule of love has superseded the rule of force." Schoul. Dom. Rel. 59.

There was, then, no error in the charge given, or in refusing the charge asked. Therefore, let the judgment of the court below be in all things affirmed.[9]

PECK, C. J., dissenting.

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[9] Accord: State v. Finley (Del.) 4 Pennewill, 29, 55 Atl. 1010 (1902); Lawson v. State, 115 Ga. 578, 41 S. E. 993 (1902). But see State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78 (1868), where an acquittal of the husband was allowed, although he struck his wife three licks with a switch the size of one of his fingers without provocation. The court, by Reade, J., said: "Our conclusion is that family government is recognized by law as being as complete in itself as the state government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable. For, however great are the evils of ill temper, quarrels, and even personal conflicts inflict-

THE QUEEN v. JACKSON.

(Court of Appeal, 1891. L. R. 1 Q. B. 671.)

Argument on the return of a writ of habeas corpus commanding Edmund Haughton Jackson to bring up the body of Emily Emma Maud Jackson taken and detained in his custody.

[Application for a writ of habeas corpus had, in the first instance, been made to and refused by the Queen's Bench Division (Cave and Jeune, JJ.). See 64 Law Times (N. S.) 679, 680.]

Affidavits were filed on both sides, the substance of which was as follows [the wife, however, had no opportunity of making any affidavit]: It appeared from the husband's affidavit that the marriage took place on November 5, 1887; that he executed a settlement of his wife's property on November 9; that on the next day he started for New Zealand, it being arranged between him and his wife that she should join him there in about six months, as soon as he got settled; that, after his arrival there, he received letters from her urging him to return, and that he accordingly did so; but she refused then to live with him; whereupon he sued for and obtained a decree for restitution of conjugal rights. His wife refusing to obey such decree, on Sunday, March 8, 1891, the husband, assisted by two young men, one of whom it appeared was a solicitor's articled clerk, seized her, just as she was leaving a church in Clitheroe in company with her sister, and forced her into a carriage, which was in readiness.

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ing only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have a government of its own, modelled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life. * * * It will be observed that the ground upon which we have put this decision, is not, that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a right to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."

In State v. Edens, 95 N. C. 693, 59 Am. Rep. 294 (1886), it was held that a verdict for the defendant husband under indictment for slandering his wife should have been directed. Smith, C. J., said: "Can an indictment be sustained against the husband for charging the wife with incontinency? At common law verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of a want of virtue in an innocent woman made in a wanton and malicious attempt to destroy her reputation. Does the enactment embrace those sustaining marital relation, or is its operation confined to those not thus related? * * * It may be suggested that an indictment might lie, while an action for damages would

The affidavits of the husband, and those who assisted him, stated that, in obtaining possession of his wife, no violence was used, and no more force than was absolutely necessary to separate her from her sister, to whom she was clinging, and get her into the carriage. In the affidavit of the wife's sister, it was stated that the wife was seized in full view of the congregation coming out of church, and that she resisted seizure, and was dragged backwards into the carriage, her feet remaining outside until they were lifted into the carriage by the solicitor's clerk. Her arm was bruised in the struggle. The carriage was then driven off, the solicitor's clerk, with whom the wife was stated to have been previously acquainted, accompanying the husband and wife in it. The carriage proceeded to the husband's house in Blackburn, which the party entered, and in which the wife had been detained until she was brought up in obedience to the writ of habeas corpus. The husband placed his wife in charge of his sister, with instructions to give her every attention, and he also engaged a nurse to attend to her in the house. During her detention he caused her to be visited by a doctor. After the seizure of the wife, certain of her relations followed to Blackburn and appeared before the house. It was stated in the husband's affidavit, that under those circumstances his coadjutors in seizing the wife remained with him in the house to assist in preventing any attempt at a forcible rescue. In consequence of warrants being taken out for their arrest on a charge of assault on the wife's sister, and the arrival of the police to execute the same, the house was kept shut up, and no one was admitted

not, as in case of the assault and battery of the wife by the husband. But it is not correct to say that such an indictment may in all cases be mintained. It is only where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted, or where it is prompted by a malicious and wrongful spirit, and not within reasonable bounds, that the law interposes to punish. In other cases, short of these extremes, it drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution. It presumes that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory. So, too, the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression, again restored. The unnumbered mischiefs that might flow from making an unguarded and false imputation upon the wife's chastity the subject of a public criminal proceeding, are so obvious that we cannot think the General Assembly intended such a possible result. Not only might this destroy the freedom and cordiality of marital intercourse, but it would tend to make a perpetual estrangement and severance, and cut off the reconciliation that may be expected to succeed a temporary difference and the atonement of a full repentance. Our law regards the marriage relation sacred and permanent, life-long in its duration, and it leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection, in cases where they admit this remedy. We are not disposed, in carrying out the policy of separate properties, to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law, by extending the act beyond all the beneficent purposes it was intended to subserve, to cover cases of slander."

for some days; but afterwards, an undertaking to appear before the magistrates having been given by their solicitors, the police were withdrawn, and, all fear of an arrest being at an end, the house was accessible to any one whom the husband cared to admit. It was stated by the affidavit of the husband, and those made on his behalf by the persons in the house during the wife's detention, that every kindness and consideration had been shown by the husband to his wife; that she had had the free run of the house, doing just as she pleased, save leaving the house; and that he had offered several times to take her for a drive, but she had declined to go. It was admitted by the husband that on one occasion the blinds of a room in which she was were pulled down, to prevent her exchanging signals with her relations outside; but they were drawn up a few moments afterwards, and no restraint was subsequently placed upon her so seeing or communicating with her relations. It appeared from an affidavit made on the husband's behalf by the doctor, who attended the wife in the house, that the only complaint whatever made by the wife to him as to the treatment she received was that her husband had, when they entered the house, taken her bonnet off and thrown it in the fire and that her arm had been hurt.

[Arguments of counsel omitted.]

At the close of the arguments the court saw Mrs. Jackson in camerâ in order to ascertain whether in refusing to live with her husband she was acting as a free agent and had not been compelled or induced by any external influence.[10]

Lord Halsbury, L. C. The Court has satisfied itself that, in refusing to go to and continue in her husband's house, Mrs. Jackson was acting of her own free will, and that she is not compelled or indeed, so far as present circumstances are concerned, induced by any to refuse to continue in his house, and was compelled to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient dicta to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by Hale, C. J., who suggests that "castigatio" may be taken to mean admonition merely. Whether the word will bear that translation in these passages I cannot say; but I am glad that someone even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist. I only mention the subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute domination of the husband over the wife. The only case referred to in which it was decided, as a question of law in an abstract form, unaccompanied by circumstances which might import a qualification, that a husband had a right to the custody of his wife, was Cochrane's Case, 8 Dowl. 630.

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[10] Statement abridged

With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances or misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition. I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom—for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there might be to some extent a right to restrain the wife. It is not necessary, however, on the present occasion to discuss that question any further than to say that I can understand that some authority on the part of the husband of such a nature and so limited might well be justified according to any system of reasonable law. We have to determine this case on the return to the writ, which states in substance that, because the wife refused to live with her husband, he took her and has since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her from returning to her relations. Such is the return by which he justifies the admitted imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement." If there be any such distinction, I should find that in this case there was imprisonment. I do not find any denial in the return that the lady is kept in imprisonment in the husband's house. The return seems to me to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The legislature has deprived the Matrimonial Causes Court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights.

The husband's contention is that, whereas the Court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights, and even that power has been now taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of the opinion that no such right exists or ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported, that, where the wife has a complaint of reason to apprehend ill-usage of any sort, the Court will never interfere to compel her to return to her husband. This brings me to the particular circumstances of this transaction. I am prepared to base my judgment on the ground that the husband has no such authority as he claims; that no English subject has such a right of his own motion to imprison another English subject, whether his wife or anyone else—of course, I am speaking of persons of full age and sui juris; but, assuming that there were such authority, it would be subject to the qualification I have mentioned in the case of apprehended ill-usage, and I am of opinion that the facts of this case afford ample ground for refusing to allow the husband to retain the custody of his wife. It seems to have been thought that the question how far a lady may be dealt with in this way depends on the exact amount of force or violence used or pain inflicted. But is it nothing that a lady coming out of church on a Sunday afternoon is to be seized by a number of men and forcibly put into a carriage and carried off? Must not the element of insult involved in such a transaction be considered? Then, if the lady's statement to the medical man be true, the moment she got into the house the husband took off her bonnet and threw it into the fire. The affidavit of the medical man states that the wife told him so: that affidavit is one of the husband's affidavits, and there is no denial that this happened by the husband. I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect.

With regard to the statements as to the earlier part of the history of the case, contained in the husband's affidavits, I am unwilling to look at them for this reason: I do not deny that unqualified and uncontradicted they do make out a case in his favour, so far as shewing that this alliance was entered into under circumstances which do not reflect any discredit on him. But I am unwilling to discuss those statements of the affidavits, because I do not know how far they can be trusted, inasmuch as the wife has not been permitted to have any opportunity of communicating with any legal advisor as to any matters on which she might have contradicted those affidavits. Therefore, it seems to me that, though one has no right to say that one disbelieves those statements, it is impossible to rely upon them under the circumstances. The result is, in my opinion, that there is no power by law such as the husband claims to exercise, and, if there were, the facts give ample ground to the lady to apprehend violence in the future. Either of these grounds is sufficient to shew that the return to this writ is bad, and that this lady must be restored to her liberty.

Lord ESHER, M. R. In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such detention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absenting herself from him so as to deprive him of her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England.

Cochrane's Case, 8 Dowl. 630, was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonor of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offence, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England.

But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one of her relations being outside, the blind is immediately pulled down. I think the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion, the circumstances are such that the Court ought not to give her back into his custody.

He has obtained, it is true, a decree for restitution of conjugal rights; but that gives him no power to take the law into his own hands and himself enforce the decree of the Court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the Court, not by the husband. The power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the Court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the Court. I think that the passing of the Act of Parliament which took away the power of attachment in such cases is the strongest possible evidence to shew that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to shew that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case.

If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the legislature has caused this by Act of Parliament, and the legislature must deal with the matter.

For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

Fry, L. J.[11] [after considering various cases, proceeded as follows:]

Therefore, if the matter rested there, I should say it was clear that by law there was no such right in the husband as contended for; but assume that the matter were doubtful at the time of the passing of the Act of 1884 with regard to the practice of the Matrimonial Causes Court, I say that it is doubtful no longer. That Act deprived the Court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment. I cannot think that, after the legislature has taken away the right of the Court to enforce restitution of conjugal rights by attachment, the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife without the assistance of the Court. * * *

Return held bad, and wife to go free.[12]

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[11] Part of the opinion of Fry, L. J., is omitted.

[12] Observe, however, that as against third parties either spouse has a right to the custody of the other. Thus in Chace, Petitioner, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493 (1904), the wife was held entitled to the custody of her spendthrift husband as against the guardian of his person and estate. In Parton v. Hervey, 1 Gray (Mass.) 119 (1854), it was held that the husband was entitled to have the wife discharged from the custody of her mother.

As to the widow's right to remove the body of her husband from the place of sepulture without the consent of the deceased's next of kin, see Hackett v. Hackett, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762 (1893); Ruggles on Law of Burial, 4 Bradf. Sur. (N. Y.) 503; 14 Am. Law Rev. (N. S. Vol. I) 62.

Note on Wife's Power to Acquire a Domicile Independently of That of Her Husband.—In Dolphin v. Robins, 7 H. L. Cas. 390, 420 (1859), it was left an open question whether a wife could, even after judicial separation, acquire a domicile different from that of her husband. Numerous decisions in this country support the view that the misconduct of the husband which will justify a divorce gives the wife capacity to acquire a new domicile for the purpose of fixing the jurisdiction of a court to grant a divorce (Ditson v. Ditson, 4 R. I. 87 [1856]; Atherton v. Atherton, 181 U. S. 166, 21 Sup. Ct. 544, 45 L. Ed. 794 [1900]), and also for other purposes, such as giving the United States court jurisdiction on the ground of diverse citizenship (Watertown v. Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865 [1901]), and determining the proper place to probate her will (Shute v. Sargent, 67 N. H. 305, 36

CHAPTER XVI

ESTATES BY ENTIRETIES[1]

HARDENBERGH v. HARDENBERGH.

(Supreme Court of New Jersey, 1828. 10 N. J. Law, 42, 18 Am. Dec. 371.)

EWING, C. J. By deed of bargain and sale, bearing date on the 31st day of August, 1822, and made "between William McKnight and Nancy his wife, of the county of Burlington, and state of New Jersey, of the first part, and James Hardenbergh and Elizabeth his wife, of the township of South Amboy, county of Middlesex and state of New Jersey, of the second part" the words, "and Elizabeth his wife," having been interlined after the deed was drawn and before it was executed, "the party of the first part," granted, bargained and sold "unto the said party of the second part, his heirs and assigns forever," a lot of land in the township of South Amboy, being the premises in question, to have and to hold, "unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever." Under this conveyance, James Hardenbergh, went into possession of the premises, built an house and made other improvements, and continued in possession until his decease. He died without issue. His wife, the lessor of the plaintiff, and one of the grantees in the deed survived him, and continued in possession of the premises for six months after his decease, at which time the defendant, who is the

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Atl. 282 [1892]). It has been held, also, that where the husband and wife were living apart by mutual consent a wife had full power to acquire a separate domicile which would fix the proper place for the probate of her will upon her death. Matter of Florance, 54 Hun, 328, 7 N. Y. Supp. 578 (1889). It has been held, also, that upon the husband's insanity, the wife has capacity to acquire a new domicile, so that she cannot be taxed at the domicile of her husband. McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162 (1906); Howland v. Granger, 22 R. I. 2, 45 Atl. 740 (1900). But where the wife acts in violation of the husband's right to determine where the family shall reside, she acquires no new legal domicile for the purpose of conferring jurisdiction upon a court where she seeks a divorce. Suter v. Suter, 72 Miss. 345, 16 South. 673 (1894).

[1] In some jurisdictions it was held that such estates could not be created, although no statute prohibited them, and the question was not affected by any Married Women's Acts. Whittlesey v. Fuller, 11 Conn. 337 (1836); Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553 (1826); Wilson v. Fleming, 13 Ohio, 68 (1844). See, also, Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550 (1900); Helvie v. Hoover, 11 Okl. 687, 69 Pac. 958 (1902); Hoffman v. Stigers, 28 Iowa, 302 (1869), where the result may have been due in part to the existence of married women's legislation. But the contrary has been held in the majority of American jurisdictions. See Baker v. Stewart, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (1888).

father of James Hardenbergh, entered, and continued, by his tenant in possession at the commencement of this action.

The lessor of the plaintiff, claims the whole premises under the above mentioned deed, and insists that she is entitled thereby to an estate in fee simple.

The counsel of the defendant, in the brief submitted to us, insists that the wife by force of the deed, "takes a joint estate with her husband for life, and then it goes over to his heirs in fee simple; a joint estate for life with remainder in fee to the husband," "a well known estate in the law;" and for example he refers to the 285th section of Littleton, which is in these words: "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple." To which Littleton, adds, "If he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." And Coke, in his comment says, "They are joint tenants for life and the fee simple in one of them."

The counsel of the defendant farther insists, that, "if the deed should be construed according to the claims of the plaintiff, still by force of our statute, Rev. Laws, 556, the lessor of the plaintiff, and her husband, were tenants in common."

It is manifestly unnecessary for us, in order to decide this cause, to enquire or determine whether the lessor of the plaintiff takes under the deed an estate for life, or an estate in fee simple, because if as the defendant insists, she took only an estate for life, and by virtue of our statute, as a tenant in common, the plaintiff, her life estate of one moiety subsisting, must be entitled in this action to judgment, to recover one moiety of the premises.

Inasmuch, however, as the plaintiff demands the whole premises, although to ascertain the duration of an estate of the lessor is not essential, yet the operation and extent of the statute respecting joint tenants and tenants in common, must be examined, because thereon depends the question whether the plaintiff is to recover the entirety or only a moiety.

Properly to understand the statute and safely and truly to construe it, we must first distinctly comprehend the nature of the estate which passes to husband and wife by a grant made to them during coverture.

A conveyance of lands to a man and his wife, made after their inter-marriage, creates and vests in them an estate of a very peculiar nature, resulting from that intimate union, by which as Blackstone says, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." The estate correctly speaking, is not what is known in the law by the name joint tenancy. The husband and wife are not joint tenants. I am aware that sometimes, and by high authority too, but currente calamo and improperly, as will, I think, be presently seen, the estate has been thus denominated. In respect however, to the name only, not to the nature of the estate, is any diversity to be found. The latter has been viewed in the same light as far back as our books yield us the means of research. The very name joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. Littleton, § 291 (665). Of an estate in joint tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety, if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized per my et per tout. Of husband and wife, both have not an undivided moiety but the entirety. They take and hold not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are, and each is seized of the whole. They are seized not per my et per tout, but solely and simply per tout. The same words of conveyance, which make two other persons joint tenants, will make husband and wife tenants of the entirety. Lit. § 665; 2 Lev. 107; Ambler, 649; Moor, 210; 2 Bl. Rep. 1214; 5 T. R. 564–568; Vezey, 199; Rogers v. Benson, 5 Johns. Ch. (N. Y.) 437; 2 Kent, Com. 112. In a grant by way of joint tenancy, to three persons, each takes one-third part. In a grant to an husband and wife, and a third person, the husband and wife take one-half, and the other person takes the other half; and if there be two other persons, the husband and wife take one-third, and each of the others one-third. Lit. § 291. In joint tenancy, either of the owners may at his pleasure, dispose of his share and convey it to a stranger, who will hold undivided, and in common with the other owner. Not so with husband and wife. Neither of them can separately or without the assent of the other, dispose of or convey away any part.[2] It has even been held where the estate was granted to a man and his wife, and to the heirs of the body of the husband, that he could not during the life of the wife, dispose of the premises by a common recovery, so as to destroy the entail; nor did his surviving his wife, give force or efficacy to the recovery. 3 Co. 5; Moor, 210; 9 Co. 140; 2 Vern. 120; Prec. Ch. 1; 2 Bl. Rep. 1214; Roper on Husband and Wife, 51. A severance of a joint tenancy may be made and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance. 3 Co. 5; 2 Bl. Rep. 1213. It has been held that a fine or common recovery by the husband during the marriage will work a severance, if the estate was granted to him and her before marriage, but if granted after marriage no severance will thereby be wrought. Ambler, 649. Joint tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition cannot be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby on the decease of one tenant, his companion becomes entitled to the whole estates. Between husband and wife the jus accrescendi does not exist. The surviving joint tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. The survivor of husband and wife, has no increase of estate or interest by the decease, having before the entirety, being previously seized of the whole. The survivor, it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected.

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[2] It has been held, however, that the husband can by quitclaim deed release to his wife. Enyeart v. Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94 (1889).

In the remarks I have made, it will have been observed, that the estates granted to husband and wife during marriage, has been the subject of examination. If lands be granted to a man and woman and their heirs, and afterwards they marry, they remain, as they previously were, joint tenants, they have moieties between them, as they originally took by moieties they will continue to hold by moieties after the marriage, and the doctrine of alienation, severance, partition and of the jus accrescendi may apply. Co. Lit. 187, b, 2; Lev. 107; Ambler, 649. And to this kind of estate, Bacon may allude in the passage cited by the defendant's counsel. 3 Bac. Abr. tit. Joint Tenants, B. "Baron and feme may be joint tenants;" or more probably, judging from the context, he means to lay down the doctrine that they may hold an estate in joint tenancy with another person; for unless used in one of these senses, the clause is unsupported by the authority cited in the margin, and differs from the succeeding passages on the same page.

Having brought to our view, the nature of the estate of husband and wife, we may proceed to ascertain the applicability of the statute, respecting joint tenants and tenants in common to the case before us.

It is enacted "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common." But we have seen that the deed of James Hardenbergh and wife, would not anterior to that statute, have created an estate in joint tenancy, that the estate created thereby would not have been considered or adjudged to be of that class. It follows then, that it is not of that nature on which the statute was designed to operate. But the counsel of the defendant, appeals very properly to the preamble and to the light which may be thence shed on the intention of the legislature. It is in these words: "Whereas, estates granted or devised to a plurality of persons without any restrictive, exclusive, or explanatory words, have heretofore been held in this state, to be estates in joint tenancy, therefore be it enacted." The very same class of cases here, as in the enacting clause, is plainly designated. Such as had been held to be estates in joint tenancy. Moreover, the preamble mentions estates granted to a plurality of persons. But husband and wife, in contemplation of law are one person, not a plurality. We shall be the more satisfied with this construction, if we recur to the causes which induced the legislature to enact this law. The hardship, surprise and unanticipated consequences of the doctrine of survivorship, can rarely if, indeed, ever be felt in the case of husband and wife.

This statute then, does not operate on the deed before us. It is subject to the principles of the common law; and by them, the wife is entitled, the husband being dead, to the possession of the whole premises.

In the case of Shaw v. Hearsey, 5 Mass. 521, the Supreme Court of Massachusetts, held that the statute of that state, did not extend to conveyances to husband and wife, a statute substantially like ours, with this difference indeed, that the words "conveyances and devises to two or more persons," are there actually contained in the enacting clause, as the counsel of the defendant proposed to read them in our statute for greater elucidation. In New York, they have a similar statutory provision; and in the cases of Jackson v. Stevens, 16 Johns. 115, and Jackson v. Cary, 16 Johns. 305, the Supreme Court decided that it did not extend to the case of husband and wife, and because their estate was not a joint tenancy. It is true, as remarked by the defendant's counsel, their statute has no such preamble. But hence, I apprehend their cases are entitled to more, not less, consideration. The preamble makes the scope of our statute more clear. In the state of Virginia, a similar decision has been made in the case of Thornton v. Thornton, reported in 3 Randolph, 179, although the words of the Virginia statute "of whatever kind the estates or thing, holden or possessed be," are much more favourable to such a construction as the counsel of the defendant has sought to establish for our statute.

Upon the whole, I am of opinion the plaintiff is entitled to recover the whole premises in controversy.[3]

[The separate opinion of DRAKE, J., is omitted.]

HILES v. FISHER.

(Court of Appeals of New York, 1895. 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762.)

In 1866 the owner of certain lands conveyed them to "William R. Fisher of the Town, County and State aforesaid, and Maria J. Fisher, his wife." The wife paid the entire consideration but consented to the form of the deed. William R. Fisher and his wife are the defendants in possession. The plaintiff claims title against them by virtue of a mortgage executed by the husband William R. Fisher alone and a foreclosure of said mortgage. The General Term adjudged that by the sale under the mortgage the plaintiff acquired the right of possession of the whole property during the joint lives of Mr. and Mrs. Fisher and of the fee in case the husband survived the wife.[4]

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[3] Accord: Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450 (1899); Wilson v. Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619 (1905).

ANDREWS, C. J. It was decided in Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361, that the separate property acts relating to the rights of married women had not abrogated the common-law doctrine, that under a conveyance to husband and wife they take not as tenants in common, nor as joint tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife as survivor took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife, during their joint lives, was not considered or decided, but was expressly reserved on the ground that it was not involved in the case then before the court. That question is involved in the present case and must now be decided.

The decision in Bertles v. Nunan is supported by the great weight of authority in other jurisdictions in this country,[5] but in some of the states it has been held that as a consequence of statutory provisions substantially like those in this state, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands, as femes sole, estates by entireties have been abrogated and turned into tenancies in common.[6] In the states where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that notwithstanding the legislation a conveyance to husband and wife retains its common-law character, and incidents. If the right of the husband to the use during the joint lives of lands held under this tenure was a right growing out of and incident to this particular species of tenancy, —in other words, if it was one of its specific and essential characteristics,—then it would be impossible to segregate this right from the other rights incident to and flowing from the tenancy, and to say that while the estate by entireties continues this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right operating upon property so held, as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 Bl. Comm. 182; Washb. Real Prop. 425. Each is said to be seised of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained, that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in Miner v. Brown, 133 N. Y. 308, 31 N. E. 24, and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common that estate would be created. See, also, McDermott v. French, 15 N. J. Eq. 78; Wales v. Coffin, 13 Allen (Mass.) 213; 1 Washb. Real Prop. 425.

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[4] Statement abridged.

[5] See Diver v. Diver, 56 Pa. 106 (1867); Baker v. Stewart, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (1888); Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450 (1899); Frost v. Frost, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689 (1906); Ray v. Long, 132 N. C. 891, 44 S. E. 652 (1903); Loughran v. Lemmon, 19 App. Cas. (D. C.) 141 (1901).

[6] Walthall v. Goree, 36 Ala. 728 (1860); Donegan v. Donegan, 103 Ala. 488, 15 South. 823, 49 Am. St. Rep. 53 (1893); Cooper v. Cooper, 76 Ill. 57 (1875); Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655 (1890).

There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See In re March, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards. Co. Lit. 187b. It was seen to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important in view of the subsequent discussion to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship in the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seisin or a joint possession for the purpose of the use during coverture. The husband was held to be entitled to the full control and to take the rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors. Barber v. Harris, 15 Wend. 615; Jackson v. McConnell, 19 Wend. 175, 32 Am. Dec. 439; Meeker v. Wright, 76 N. Y. 262; Bertles v. Nunan, supra; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from the general principle of the common law which vested in the husband jure uxoris the rents and profits of his wife's lands during their joint lives. 2 Kent, Comm. 130; Stew. Husb. & Wife, § 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits and control of lands held by him and his wife in entirety, during their joint lives, it is important to regard not only the language, but the spirit of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands jure uxoris, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property.

In determining the question now before us, too much emphasis cannot be placed upon the fact that the legislation of 1848, and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife and the right to exclude her from its enjoyment. If it still held, notwithstanding this legislation, that the husband takes the whole rents and profits during coverture in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and estate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives. Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in McCurdy v. Canning, 64 Pa. 39, or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right jure uxoris, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of

Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife of the premises subject to her right of survivorship. The opinion of the general term exhibits, with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives the wife. See 1 Washb. Real Prop. 425; 1 Prest. Est. 135; Ames v. Norman, supra.

The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without costs to either party. All concur, except HAIGHT, J., not sitting.

Judgment accordingly.[7]

MORRILL v. MORRILL.

(Supreme Court of Michigan, 1904. 138 Mich. 112, 101 N. W. 209, 110 Am. St. Rep. 306.)

CARPENTER, J. The parties to this suit are husband and wife. They were married about 13 years ago. In December, 1901, they separated, and shortly afterward defendant filed a bill for divorce, which, upon a hearing, was dismissed. They own 80 acres of land as tenants by the entirety, upon which, in 1903, complainant had a crop of grapes. Defendant undertook to harvest this crop. Complainant filed this bill to enjoin such action. Defendant filed a cross-bill averring that she contributed the money for the purchase of this property under a verbal agreement that, while the title should be taken as it was, she should have an "equal share in the profits arising from said premises." Upon this ground, as well as upon the ground that she had a similar right as a tenant by the entirety, she prayed for an accounting, and that the property be placed in the hands of a receiver. The controversy was heard by the lower court, and the prayer of this cross-bill granted.

Two questions are raised by this appeal: First. Has the wife a right to a share of the crops growing on lands held by her and her husband as tenants by the entirety? If the wife has a right to compel her husband to account for a share of the crops on land held by entireties when they are living separate, as in this case, she cannot be denied that right when they are living together. If she has such a right, it becomes important to determine where she obtained it. The common law certainly gave her no such right; for, according to its principles, the exclusive right to dispose of the crops and use the proceeds as he saw fit belonged to the husband. See Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361. It follows, therefore, that if the wife has that right now she obtained it as the result of some statute of this state. The only statute which it can be claimed has any bearing on this subject is our married woman's act. Section 8690, Comp. Laws 1897. I think it must be conceded that the decisions of this court have determined that this statute has no application to estates by entirety. See Fisher v. Provin, 25 Mich. 347; Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Speier v. Opfer, 73 Mich. 35, 40 N. W. 909, 2 L. R. A. 345, 16 Am. St. Rep. 556; Naylor v. Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595; Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 568; Doane v. Feather's Estate, 119 Mich. 691, 78 N. W. 884.

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[7] Accord: Bilder v. Robinson, 73 N. J. Eq. 169, 67 Atl. 828 (1907); Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97 (1899).

I think it unnecessary to determine whether the husband's exclusive control of these crops is an incident of estates by entirety, or whether, as held in Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762, and Buttlar v. Rosenblath, supra, it is a result of the marital unity. If it is an incident of estates by entirety, then since, under our decisions, estates by entirety remain as at common law, that right continues to belong to the husband. If it is a result of the marital unity, the same conclusion must be reached, because we have held—as we were bound to hold—that the statute does not affect the marital unity. See Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. And accordingly we have—as we were bound to do—rejected the authority of Hiles v. Fisher and Buttlar v. Rosenblath, supra. See Dickey v. Converse, supra. We are compelled to conclude from this reasoning that as a tenant by the entirety the wife has no such interest in the crops as to justify the decree complained of.

It is contended, however, that the decision of this court in Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 568, justifies the decree. In that case it was held that no interest in growing crops upon land held by husband and wife as tenants by the entirety was subject to seizure on an execution issued to collect a judgment against the husband; that the levy could not be supported either upon the ground that the husband owned the entire crops or on the ground that as a tenant in common he owned an interest of one-half therein which was subject to seizure.[8] This decision proceeded upon the ground that estates by entirety at the common law continued to exist in this state, and that the "crop raised on land held by husband and wife by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband." To argue that Dickey v. Converse is an authority for the proposition that the wife has an interest in the crops which she did not have at common law is to argue that the conclusion reached in that case compels us to reject the premise upon which it is founded. Such an argument cannot be sound. Dickey v. Converse is, in my judgment, an authority against, rather than in support of, the proposition under consideration. It was there decided that the husband has not—and this certainly means that the wife has not—such an interest in the crops that it might be taken on an execution. If the wife's interest in such crops cannot be taken on an execution, I do not think that it can be separated or set out to her on an accounting. I think that, construing Dickey v. Converse, as we are bound to do, in harmony with the former decisions of this court, the authority of which it recognizes, we are bound to say that, while the wife has such an interest in these crops that they cannot be taken on an execution against her husband, such interest does not interfere with his power of management, disposition, and control.

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[8] See, also, McCurdy v. Canning, 64 Pa. 39 (1870), where it was held that a purchaser at a sheriff's sale under a judgment against a husband of his interest in an estate held with his wife by entireties cannot recover possession during the wife's life.

Nor do I think it can be justly urged that this conclusion makes the right of the wife valueless. There may be instances—and perhaps this is one—where the wife needs legal protection from a cruel husband, who misappropriates property which in a moral sense may be characterized as a trust; but, after all, such instances are exceptional, and when they arise may ordinarily be dealt with in a suit for divorce. As a general proposition, it is of advantage to the wife and to the family that no outside person shall have the right to interfere with a husband who may be safely trusted to dispose of the profits arising from such an estate according to his judgment. It may be conceded that it is anomalous to hold that the wife's interest in this property is sufficient to prevent its being taken on an execution against her husband, and at the same time it is not sufficient to enable her to use it for her own benefit. But this is by no means a conclusive argument. The truth is, estates by entirety are anomalous. It is anomalous to hold that a wife has such an interest in the profits of such an estate that they cannot be sold for her husband's debt and at the same time to hold that they cannot be taken for her debt. It would also be anomalous to hold, as we are asked by complainant, that a wife's interest in the crops raised upon a piece of land is subject to partition and separation, and at the same time to concede, as I think we must, that her interest in the land is not.

Second. Can a wife make a binding verbal agreement with her husband that she shall have an equal share in the profits arising from land held by them as tenants by the entirety? If she can, then by an oral agreement the legal effect of the deed is changed, and it is settled that "no parol proof can be admitted to give the deed a different effect than such as the words in it legitimately import." Jacobs v. Miller, 50 Mich. 126, 15 N. W. 42.

It results from this reasoning that the decree appealed from should be vacated, and complainant be given a decree in accordance with the prayer of his bill.

GRANT, J., did not sit. The other Justices concurred.

FLADUNG v. ROSE.

(Court of Appeals of Maryland, 1881. 58 Md. 13.)

Appeal from the Circuit Court of Baltimore City.

The bill in this case was filed by the appellee against the appellants for the purpose of having certain deeds declared fraudulent, as intended to hinder and delay the creditors of Bernhard Fladung. The property sought to be affected by the proceeding, had, prior to the execution of the deeds assailed for fraud, been conveyed to Bernhard Fladung, and Barbara Fladung, his wife, for the purpose, as recited in the deed to them, "of creating a joint tenancy in Bernhard Fladung and Barbara Fladung," and the habendum in said deed was "to the said Bernhard Fladung, and Barbara Fladung, his wife, as joint tenants, and not as tenants in common, the survivor of them, and the heirs, personal representatives and assigns of such survivor." The Court below, (Dobbin, J.,) passed a decree setting aside the deeds assailed for fraud, and directing the undivided interest of Bernhard Fladung as joint tenant in the property conveyed by said deeds, or so much thereof as might be necessary, to be sold for the payment of the complainant's claim, unless the same was paid by a day named in the decree.

The defendants appealed.

MILLER, J., delivered the opinion of the Court.

On the 5th of February, 1874, Bernhard Fladung, for the alleged consideration of $3500, conveyed all his property to his wife Barbara Fladung. In October, 1875, he and his wife conveyed the property to one Hauser for the consideration of $4000, and a few days thereafter Hauser conveyed the same to one Rost for the alleged consideration of $4500. In May, 1876, Rost, by three deeds, the aggregate considerations of which amounted to $8000, conveyed the same property to Mrs. Fladung, and on the 16th of August following, she and her husband conveyed the same to the latter in trust for the wife for life, and upon her death in trust for their three children. It thus appears that the property was transferred first from the husband to the wife, and eventually back to the husband in trust for his wife and children. That these several conveyances were each and all of them contrived and executed for the purpose of hindering, delaying and defrauding the husband's creditors admits of no reasonable doubt. He was not only largely indebted at the time, but the several considerations expressed in the deeds are all admitted or proved to have been fictitious and false, and during the whole period he remained as he was before, in possession of all the property, receiving the rents and income therefrom to his own use.

[Part of opinion omitted.]

His [appellant's counsel] main effort was to convince the Court that even if these deeds be void, the title to the property would then be determined by the antecedent deeds of October, 1871, and that these latter conveyances created in the grantees, husband and wife, not a joint tenancy, but a tenancy by entirety, under which the husband's interest could not be subjected to execution by his creditors, at least during the life of the wife. The question thus presented is certainly an interesting, and, in this State, a novel one.

By the deeds referred to, executed on the 26th of October, 1871, Fladung and wife, "for the purpose of creating a joint tenancy in said Bernhard and Barbara Fladung, in all their property," conveyed the same to one Linberger, who immediately re-conveyed it to the said Bernhard Fladung and Barbara Fladung "as joint tenants, and not as tenants in common, the survivor of them and the heirs, personal representatives, and assigns of such survivor." Now it must be conceded, that these conveyances do in fact, if such a thing be legally possible, make, and were intended to make, the husband and wife joint tenants of this property. Their purpose was to create that estate and no other. But it is contended that wherever property is conveyed to husband and wife, the law intervenes and declares that they are both seized of the entirety, and can take no other interest or estate, no matter what may be the terms of the instrument or the intention of the parties; and upon this question there is, undoubtedly, a conflict of opinion and authority.

In Maryland there are but two cases in which deeds conveying property to husband and wife have come before this Court for construction. The first is Craft v. Wilcox, 4 Gill, 504, where the conveyance was to husband and wife "and their heirs and assigns forever, and the survivor of them," and it was held the husband took the whole by survivorship. In that case it was contended that, as the deed was executed since the Act of 1822, c. 162, which prohibited the creation of an estate in joint tenancy unless the instrument expressly provides that the property conveyed "is to be held in joint tenancy," the grantees took as tenants in common, but the Court said the deed was not affected by this Act, because it "does not create a joint tenancy." The opinion delivered by the Court in that case is exceedingly brief, and it must be confessed is not very satisfactory.

The other case is that of Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266, where the deed simply conveyed the property to husband and wife, "their heirs and assigns in fee." The wife survived, and the question in the case was whether she had and could convey a clear title to the property. The Court recognized the common law doctrine stated by Blackstone that husband and wife, being considered as one person in law, cannot, under a conveyance to them jointly, take the estate by moieties; but both are seized of the entirety per tout et non per my, as still in force in this State, and held, 1st, that the estate conveyed to husband and wife by a deed like the one in that case, is not to them as joint tenants at common law, and hence the Act of 1822, c. 162, does not apply; and 2nd, that the provisions of sections 1 and 2 of art. 45 of the Code, authorizing married women to acquire and hold property as therein provided, do not "at all affect the nature of the estate conveyed to husband and wife by deed to them jointly." This is the extent of the decision in that case. Nothing further was in fact decided or intended to be decided, and the reference to the Pennsylvania decisions was made simply for the purpose of adopting the reasoning of those cases as satisfactory and conclusive upon the question that statutes similar to our own, in reference to the power of married women over their property, do not in any manner affect the nature of the estate, which according to the common law, husband and wife take by a grant to them jointly.

In neither of these cases did the deed profess to create an estate in common or a joint tenancy, and in the latter this fact is noticed, and the Court refrained from expressing any opinion as to what would be the effect of a conveyance like the one now before us, which in terms declares the grantees shall take as joint tenants, and not as tenants in common, and which was executed with the avowed intent and for the express purpose of creating a common law joint tenancy. It has not, therefore, been decided in this State that under such a conveyance husband and wife cannot take and hold as joint tenants, nor do we find such a decided preponderance and weight of authority elsewhere, as to conclude the question.

It is true there may be found in many cases expressions and dicta to the effect that in no contingency, no matter what may be the terms of the grant, can husband and wife under a conveyance to them after marriage, take or hold as joint tenants or as tenants in common; but the cases in which the point has directly arisen, and where it has been expressly so adjudged, are very few. In Pollock v. Kelly, 6 Irish. Com. Law Rep. 367, the deed conveyed the property to husband and wife, "as joint tenants," and it was held that the effect of it was to grant an estate by entireties; "for to speak of a grant to a husband and wife as an estate of joint tenancy is, properly speaking, a solecism." On the other hand, Mr. Preston nearly a century ago, in his valuable Treatise on Estates, after stating the common law doctrine of tenancy by entireties to be when husband and wife take an estate to themselves jointly by grant or devise made to them during coverture, and showing that it is founded upon the legal notion of the unity of two persons who are husband and wife, says, "In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly when lands are granted to them as tenants in common, thereby treating them without respect to their social union, they will hold by moieties as other distinct and individual persons would do." Preston on Estates, 131, 132.

We have been referred to no English case, and we have found none in which this opinion of Mr. Preston has been reviewed. In this country it has been quoted, and with apparent approval by all the text-writers. 4 Kent's Com. 363; Bishop on the Law of Married Women, § 616; Freeman on Co-Tenancy and Partition, § 72; 1 Washburn on Real Property, 674. The actual decisions upon the point have, however, been conflicting. In New York the question first arose in Dias & Burn v. Glover, 1 Hoff. Ch. 71, where the deed in express terms created a tenancy in common, and Mr. Preston's view of the law was rejected by the assistant Vice-Chancellor, who held that the grantees took the estate by entireties. But subsequently, in the case of Hicks, Ex'r, etc., v. Cochran et al., 4 Edw. Ch. 107, in the same Court, where land was conveyed to husband and wife "the one equal half part to each," the decision was based upon this citation from Preston on Estates, and the Vice-Chancellor after stating the substance of the rule as laid down by Mr. Preston, declared he had no hesitation about adopting and following it. In Pennsylvania the decisions have followed that of Dias & Burn v. Glover, as will appear by reference to the case of Stuckey v. Keefe's Ex'r, 26 Pa. 397, where the conveyance being to husband and wife "their heirs and assigns as tenants in common, and not as joint tenants," it was held they took by entireties and not as tenants in common.[9] But more recently in New Jersey, Mr. Preston's rule has been approved and followed in McDermott v. French, 15 N. J. Eq. 78. In that case a bill for partition alleged that husband and wife were seized in fee of the premises as tenants in common under a certain conveyance made to them, and a demurrer was interposed upon the ground that the estate conveyed must necessarily have been an entirety, and was not therefore the subject of partition. But the demurrer was overruled upon the authority of Mr. Preston, reference being made to his Treatise on Estates, and to 4 Kent's Com., 363, and the Chancellor said: "So it seems that a husband and wife may by express words be made tenants in common by gift to them during coverture."[10]

We find then nothing in point of authority absolutely decisive against the view of the law thus taken by Mr. Preston. But assuming it to have been erroneous at the time it was originally announced, has not the common law been so far modified in recent times as to allow the adoption of such a rule? Modern legislation in this country has to a very great extent removed the common law disabilities of married women, and in this respect the statute law of Maryland is quite as liberal, and has gone quite as far as that of most of her sister States. By our Code, all the property belonging to a married woman at the time of her marriage, and all she may thereafter acquire and receive, is not only protected from the debts of her husband, but she is empowered to hold it for her separate use, to devise it as if she were a feme sole, and to convey it by a joint deed with her husband; the necessity of a trustee to secure to her the sole and separate use of her property is dispensed with, and she can sue by next friend in a Court of law or equity in all cases for the recovery and protection of her property as fully as if she were unmarried. In view of these provisions, it seems unreasonable to say that the legal unity and oneness of man and wife, upon which the peculiar tenancy by entireties was founded, still continues just as it existed at common law. Nor is it inconsistent with what was decided in Marbury v. Cole, to hold that the common law in this particular has been, to some extent at least, modified by our statutes. We have said in that case that these provisions of the Code do not affect the nature of the estate, which, according to the common law, husband and wife take by a grant to them jointly, but this must be confirmed as it was intended to be, to cases where the terms of the grant are similar to those in the deed then under consideration, viz., to husband and wife jointly, or to them and their heirs and assigns in fee. In such cases we have said the common law rule prevails and a tenancy by entireties is the result, but this was not placed on the ground of any existing incapacity of husband and wife to take in any other mode. Where the terms of the instrument are such or similar to those used in that deed, the presumption is the parties intend to create this peculiar species of tenancy, and the common law remains in force so far as to require the estate to be limited accordingly. But where the intention is manifest, and apt words are employed to create a tenancy in common or a joint tenancy, we are of opinion that in this State husband and wife are now capable of taking and holding as tenants in common or as joint tenants, according to the express terms of the grant, and if at common law they were incapable of so taking and holding, the effect of our statute law is to remove that incapacity.

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[9] See, also, Wilson v. Frost, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619 (1905); dissenting opinion of Horton, C. J., in Baker v. Stewart, 40 Kan. 442, 456, et seq., 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (1888).

[10] Accord: Fulper v. Fulper, 54 N. J. Eq. 431, 34 Atl. 1063, 32 L. R. A. 701, 55 Am. St. Rep. 590 (1896).

And the conclusion we have thus reached is in entire accord with our decision in Clark v. Tennison, 33 Md. 85, where the effect of one of these statutes upon a common law doctrine was considered. In that case, a woman at the time of her marriage was possessed of a renewable term for ninety-nine years, and after marriage the husband purchased the reversion in the property. It was conceded that, according to the weight of authority at common law, the term was by this purchase merged and extinguished, but it was held that the application of this doctrine would be against the spirit and intention of the Act of 1853, c. 245, and tend to defeat its purpose and design. That Act, though protecting the wife's property from the husband's debts, still left it subject to his marital rights, and yet the Court held its effect was to so far restrain and limit his ownership and dominion as to prevent, in such a case, the application of the common law doctrine of merger.

We therefore adjudge that Fladung and wife became joint tenants of the property conveyed to them by the deeds of October, 1871; and as it is conceded the husband's interest as joint tenant can be seized in execution and sold by his creditors during the life of the wife, the decree appealed from, which provides for such sale unless the complainant's judgment be paid, must be affirmed. The case being thus disposed of the question whether the husband's interest in case of a tenancy by the entirety can in like manner be subjected to the claims of his creditors during the life of the wife does not arise.

Decree affirmed, and case remanded.[11]

STELZ v. SHRECK.

(Court of Appeals of New York, 1891. 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475.)

In 1886 premises in the city of New York were conveyed by deed to William Stelz and Minnie Stelz, his wife. Subsequently William obtained a divorce upon the ground of his wife's adultery. He thereafter married the plaintiff and died intestate. The plaintiff claimed dower in the whole of the land. The defendant, Minnie Schreck, formerly Minnie Stelz, claimed that the tenancy by the entirety created by the deed, was unaffected by the decree of divorce, and that upon the death of her former husband the whole estate vested in her.

PECKHAM, J. We agree in this case with the views expressed by the learned judges who delivered the opinions at the Special and General Terms of the Supreme Court. 10 N. Y. Supp. 790; 60 Hun, 74, 14 N. Y. Supp. 106. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety. Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Zorntlein v. Bram, 100 N. Y. 13, 2 N. E. 388.

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[11] Accord: Carroll v. Reidy, 5 App. Cas. (D. C.) 59 (1894); Appeal of Robinson, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367 (1895); Jooss v. Fey, 129 N. Y. 17, 29 N. E. 136 (1891); Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422 (1893); Wilkins v. Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162 (1895); Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488 (1888); Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210 (1904); Green v. Cannady, 77 S. C. 193, 57 S. E. 832 (1907); Young's Estate, 166 Pa. 645, 31 Atl. 373 (1895). But see Simons v. Bollinger, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234 (1900), a conveyance to husband and wife "jointly" creates an estate by entirety; Miner v. Brown, 133 N. Y. 308, 31 N. E. 24 (1892).

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form. Barber v. Harris, 15 Wend. 615; Jackson v. McConnell, 19 Wend. 175, 32 Am. Dec. 439; Bertles v. Nunan, supra.

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. Jackson v. McConnell, supra.

At common law husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole and not of any undivided portion. They were thus seised of the whole because they were legally but one person. Death separated them, and the survivor still held the whole because he or she had always been seised of the whole, and the person who died had no estate which was descendible or devisable.

Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce a vinculo, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the first wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, what is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate vested was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as plausible view to say that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage, and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one as in the case of death there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common, without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seisin by the entirety does not create a joint tenancy either in substance or form (19 Wend. supra), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seisin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of person upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would, at common law, have created a joint tenancy. But our statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy. 1 Rev. St. p. 727, § 44. This statute did not reach an estate by the entirety, nor did the statutes of 1848 and 1849, and 1860 and 1862. Bertles v. Nunan, supra. It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of a tenancy by the entirety resulting from an absolute divorce, be changed into a joint tenancy in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and, therefore, when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute.

The counsel for the defendant urges that we are giving by this decision a retroactive effect to a decree of divorce in a case not warranted by the statute, and in violation of the well-settled rule in this state as to the effect of such a decree. He says that we change the effect of the deed of conveyance and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this state only operates for the future, and has no retroactive effect or any other effect than that given by statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revest in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must, therefore, remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common and of course without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as survivor of her husband cannot be maintained. Although the question is new in this state, it has been somewhat debated in the courts of some of the other states. In Harrer v. Wallner, 80 Ill. 197, and Lash v. Lash, 58 Ind. 526, and Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269, similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan in the Case of Lewis, reported in 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state and shall not by his or her misconduct cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treats the estate as dependent upon any such condition, and however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the Supreme Court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affirmance should be on both appeals, without costs. All concur, except EARL, J., dissenting, and FINCH, J., absent.

Judgment affirmed.[12]

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[12] Accord: In addition to the cases cited in opinion, see Donegan v. Donegan, 103 Ala. 488, 15 South. 823, 49 Am. St. Rep. 53 (1893); Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581 (1894).

ALLES v. LYON.

(Supreme Court of Pennsylvania, 1907. 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791.)

Case stated to determine the marketable title to real estate. It appeared that the plaintiff, Louisa Alles, was divorced from John P. Reis. Reis and the plaintiff held the land in question as tenants by entireties. The court entered judgment for the plaintiff for $1,775. The defendant appealed.

Opinion by Mr. Chief Justice MITCHELL.[13] * * * Coming now to the main question in the case, we are of opinion that the court below erred in holding that the estate by entireties was severed by the subsequent divorce of the husband and wife.

The subject is very bare of authorities. The law as to divorce prevented this question from arising in the earlier English cases, and in the few cases reported in this country the decisions, all more or less affected by statutes, are at variance, with no clear preponderance in either way. Lewis' Appeal, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94, may be regarded as the best discussion in favor of the view that the nature of the estate is not changed, and Ames v. Norman, 36 Tenn. 683, 70 Am. Dec. 269, as the best on the other side.

The question has not previously come before this court, and we are left to decide it on general principles.

An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage. Being regarded as one person in law they take not in parts or shares, like joint tenants or tenants in common, but each takes the whole, or in the ancient phrase they are seized, not per mie et per tout, but per tout only. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of husband or wife the survivor takes no new title or estate; he or she is in possession of the whole from its inception. It was early held that our act of March 31, 1812 (5 Smith's Laws, p. 395), abolishing survivorship in joint tenancy, did not affect estates by entireties. Robb v. Beaver, 8 Watts & S. 107 (111). And the same view has been taken of the married women's Acts of April 11, 1848 (P. L. 536), and later. Diver v. Diver, 56 Pa. 106; Bramberry's Est., 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64.

The general subject of estates by entireties is learnedly discussed by Lewis, C. J., in Stuckey v. Keefe's Ex'rs, 26 Pa. 397, our leading case. It was there held that a conveyance to husband and wife, their heirs and assigns, "as tenants in common, and not as joint tenants" created an estate by entireties, and the opinion was strongly expressed that the estate arose by virtue of "a rule of law founded on the rights and incapacities of the matrimonial union" and therefore that the intention was immaterial. No subsequent case has gone so far, and in Merritt v. Whitlock, 200 Pa. 50, 49 Atl. 786, it was said that it may be considered as still an open question whether husband and wife may not, since the married women's property acts, take as well as hold in common if that be the clear actual intent, notwithstanding the presumption to the contrary.

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[13] Statement abridged, and part of the opinion omitted.

The argument for the change by divorce from an estate by entireties to a tenancy in common rests on the assumption that as the basis of the estate is the unity of person, a severance of that unity carries with it a severance of the estate; that as after divorce an estate by entireties could not be created between the parties it cannot be continued. But this view fails to give due weight to the rule that the quality of the estate is determined at its inception. It arises not out of unity of person alone, but out of unity of person at the time of the grant. "If an estate be made to a man and woman and their heirs, before marriage, and after [wards] they marry, the husband and wife have moieties between them." Coke Litt. 187b; and see 2 Cruise's Digest, 494, and 2 Plowden, 483, cited in Stuckey v. Keefe's Ex'rs, 26 Pa. 397. No stronger illustration could be given. If subsequent unity of person cannot change a tenancy in common to one by entireties, e converso a subsequent severance of the unity of person ought not to change a tenancy by entireties to one in common. In entire accordance is our latest case (Hetzel v. Lincoln, 216 Pa. 60, 64 Atl. 866), where a conveyance to husband and wife "jointly" was held to create an estate by entireties which continued with its incident of survivorship, although the husband had conveyed his interest to the wife as "the undivided one half" and they had subsequently executed a mortgage in which the conveyance by the husband was referred to. A creditor had obtained a judgment against the husband and after his death sought to revive it against his administrator, with notice to the wife as terretenant, on the ground that they had become tenants in common, but it was held that he could take nothing. "Whatever may have been the intention of the husband" said our Brother Brown, "the right of the wife was fixed by the deed from Reed. By it each held an entirety and upon the death of either the estate would vest absolutely in the other as the survivor. The husband conveyed nothing to the wife that she would not have enjoyed if she survived him, which she did." The decisions and the statutes, referred to supra, go to show that in regard to the nature and qualities of an estate by entireties the general rule of law applies that they are determined at the inception of the estate.

In the present case, therefore, the parties took an estate by entireties at the time of the grant. By it the husband took a vested estate to which was incident a right of survivorship. That estate could not be divested, or stripped of any of its incidents except by express statutory provision existing at the time of its inception. The divorce severed the unity of person for the future, but it could not avail retrospectively to sever the vested unity of title and possession.

[Remainder of opinion omitted.]

Judgment reversed, and judgment directed to be entered for the defendant.

PHELPS v. SIMONS et al.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.)

LATHROP, J. This is a bill in equity against Catharine L. Simons and Simeon B. Simons, her husband. Sarah C. Simons, the mother of Simeon, died on April 8, 1872. By her will, dated October 31, 1870, which has been duly admitted to probate, she devised and bequeathed the residue of her estate, real and personal, to her "son, Simeon B. Simons, and his wife, Kate L. Simons, and to the survivor of them, and the heirs of such survivor, to have and to hold the same forever." Sarah died possessed, among other property, of twelve shares of the capital stock of the Second National Bank of Springfield. On December 3, 1872, said bank issued a certificate of said shares, in which it is set forth that "Simeon B. Simons and his wife, Kate L. Simons, and the survivor of them, and the heirs of such survivor," are proprietors of twelve shares of the capital stock of said bank. The answer of the defendant Catharine, which is found to state the facts correctly, sets forth that she has possession of said certificate, "which was left in her possession several years since by her said husband."

On October 15, 1891, Simeon B. Simons, by an instrument in writing, undertook to sell said certificate, and the twelve shares of stock represented thereby, to the plaintiff, for a valuable consideration. He also, by the instrument, appointed the plaintiff his attorney to make the transfer. The bank refused to make the transfer until the outstanding certificate was delivered up, and Catharine refused to deliver up the certificate. The prayer of the bill is that Catharine be ordered to produce the outstanding certificate, and to deliver the same to the plaintiff.

In 1870, when this will was made, and in 1872, when it was admitted to probate, the General Statutes were in force; and it was provided by chapter 108, § 1, that "the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, * * * shall, notwithstanding her marriage, be and remain her sole and separate property." Mr. Justice HOLMES, Mr. Justice BARKER, and the writer of this opinion think that under this statute Simeon B. Simons had no power to alienate his wife's interest, believing that the case of Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462, which relates to the validity of a lease made by a husband while the joint tenancy continued, has no bearing on the question. The same justices also think that, whatever may be the effect of the various statutes then in force as to the estate which the husband and wife took, the wife was entitled, as between herself and her husband, to one half to her separate use. See Mander v. Harris, 27 Ch. D. 166; Jupp v. Buckwell, 39 Ch. D. 148. But the other justices are of opinion, on the authority of Pray v. Stebbins, that Gen. St. c. 108, § 1, does not apply, and we proceed to consider the case irrespective of the statutes relating to married women.

At common law a devise to husband and wife vested in them an estate by entireties; not strictly a joint tenancy, but, as said by Mr. Justice Wells in Wales v. Coffin, 13 Allen, 213, 215, "one indivisible estate in them both, and the survivor of them." See also, Pierce v. Chace, 108 Mass. 254; Pray v. Stebbins, 141 Mass. 219, ubi supra; Donahue v. Hubbard, 154 Mass. 537, 28 N. E. 909, 14 L. R. A. 123, 26 Am. St. Rep. 271; Morris v. McCarty, 158 Mass. 11, 32 N. E. 938.

While the husband has the entire right to the use and benefit of the estate during coverture, (Pray v. Stebbins, ubi supra,) he cannot alienate it. Thus in Fox v. Fletcher, 8 Mass. 274, where land was devised to a husband and wife, the wife, who survived her husband, was held entitled to maintain a real action against a grantee in fee of her husband. So in Donahue v. Hubbard, ubi supra, it was said by Mr. Justice Allen: "The peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other."

The bequest in this case is to the husband and his wife, "and the survivor of them, and the heirs of such survivor." A conveyance in this form, at common law, to persons not husband and wife would give a joint estate for life, and a contingent remainder to the survivor. 2 Cruise, Dig. tit. 18, c. 1, § 2, note; 1 Greenl. Cruise, 364a; Co. Litt. 191a; In re Harrison, 3 Anst. 836; Vick v. Edwards, 3 P. Wms. 372; Hannon v. Christopher, 34 N. J. Eq. 459.

The plaintiff admits that at common law a bequest to husband and wife vests in them an estate by entireties. See Gordon v. Whieldon, 11 Beav. 170; Atcheson v. Atcheson, 11 Beav. 485. He contends, however, that, as at common law a husband may dispose of his wife's personal property as he pleases, he has the same right where the property is held by entireties. None of the cases which he cites for this position support it. There is no doubt that shares of stock may be bequeathed to a wife for life, with remainder to B. In such a case, at common law, the husband could dispose of only the life interest of his wife in the shares; and where the shares are left by will to a husband and wife, the latter takes a life interest with her husband, and a remainder contingent on her surviving him. With the latter, a court of equity will not permit him to meddle. In Atcheson v. Atcheson, 11 Beav. 485, where a legacy was left to a husband and wife, it was held that the wife's right to it by survivorship was entitled to protection, and it was ordered that the legacy be carried to the joint account of the husband and wife, with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply.

In Moffatt v. Burnie, 18 Beav. 211, a bequest was made to A. and his wife, for their lives, with remainder over, and it was held that the husband and wife took, not in joint tenancy, but for their joint lives and the life of the survivor.

In Ward v. Ward, 14 Ch. D. 506, where a husband and wife held an annuity by entireties, it was held that the whole of it was, during their joint lives, liable to the husband's debts, but the order was only to pay during the life of the husband. See also Godfrey v. Bryan, 14 Ch. D. 516; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76, 105.

It follows, in the opinion of a majority of the court, that Mrs. Simons will be entitled to the shares of stock should she survive her husband. The mere fact that the husband placed the certificate in the possession of his wife gave her no additional rights. Cummings v. Cummings, 143 Mass. 340, 9 N. E. 730.

The result is that the plaintiff is entitled to the dividends on the stock during the joint lives of the husband and wife, and is entitled to the shares in the contingency of the husband surviving his wife. If, however, the wife survives her husband, she is entitled to the shares absolutely.

As the bank has not been made a party to this suit, no order can be passed directing it to do anything. And, as the wife has an interest in the shares, there is no ground for directing her to deliver the certificate to the plaintiff, as the case now stands. If, before a final decree is entered, the plaintiff desires to amend his bill by making the bank a party, and to have a trustee appointed to hold the shares in accordance with this opinion, he may apply to a single justice for this purpose.

So ordered.[14]

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[14] A fortiori, when the chose in action runs in favor of the husband and wife, and the husband attempts to reduce it to possession, the whole nevertheless goes to the wife if she survives. Boland v. McKowen, 189 Mass. 563, 76 N. E. 206, 109 Am. St. Rep. 663 (1905); Klenke's Estate, 210 Pa. 572, 60 Atl. 166 (1905); Parry's Estate, 188 Pa. 33, 41 Atl. 448, 49 L. R. A. 444, 68 Am. St. Rep. 847 (1898); Young's Estate, 166 Pa. 645, 31 Atl. 373 (1895); Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64 (1893); Abshire v. State, 53 Ind. 64 (1876); Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060 (1901); Allen v. Tate, 58 Miss. 585 (1881); Wilder v. Aldrich, 2 R. I. 518 (1853); Pile v. Pile, 6 Lea. (Tenn.) 508, 40 Am. Rep. 50 (1880); Johnson v. Lusk, 6 Cold. (Tenn.) 113, 98 Am. Dec. 445 (1868); Richardson v. Daggett, 4 Vt. 336 (1832); Fiedler v. Howard, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865 (1898). But in Cleland v. Watson, 10 Grat. (Va.) 159 (1853), it was held that, when slaves were conveyed to husband and wife, the husband

The CHIEF JUSTICE and Justices KNOWLTON and MORTON, think that the statutes enabling married women to take, hold, manage, and dispose of real and personal property as if they were sole, do not apply to the estate or title by entireties of husband and wife in personal property any more than in real property. Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462. They also think that the will vested in the husband, and wife a title by entireties in the shares in question. It follows that the power over the shares is to be settled by the common law. By that law the husband became, upon marriage, the absolute owner of all the wife's chattels in possession. Legg v. Legg, 8 Mass. 99; Com. v. Manley, 12 Pick. 173.

Upon reducing her choses in action to possession, he became the absolute owner of them also. Hayward v. Hayward, 20 Pick. 517. If he did not reduce them to possession, and she survived him, she took them by virtue of her survivorship. Hayward v. Hayward, ubi supra. If, therefore, these shares had belonged absolutely to the wife, the husband could have disposed of them at common law, as he has done, and thus would have extinguished completely the wife's right of survivorship. But these shares were not the wife's. The title to them was in the husband and wife by entireties. The whole of the title was in the husband, as well as in the wife. Her right of survivorship cannot possibly be greater when the whole title is in her husband as well as in herself, than when it is solely in herself. No case to which we have been referred holds that at common law the wife has a right of survivorship in a chose in action, either belonging solely to herself, or to her husband and herself by entireties, which is incapable of extinguishment by the husband in his lifetime. On the contrary, it was said in substance, in Atcheson v. Atcheson, 11 Beav. 485, which is relied on by the majority of the court, and which was a case of a legacy to a husband and wife, that her right to the whole as survivor was dependent on the fact that it had not been disposed of by the husband in his lifetime; and in Ward v. Ward, 14 Ch. D. 506, it was distinctly held that the wife's right as tenant by the entirety of an annuity given to herself and husband during their joint lives was not property of the wife, out of which a settlement could be made under direction of the court for her benefit.

The cases in regard to the husband's right over the wife's real estate, or over real estate belonging to himself and wife by entireties, stand on different ground, and furnish no guide in a case like this. No doubt, when an assignee in insolvency of the husband or his creditors

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might in his lifetime transfer the whole interest in the slaves to another, so as to cut off the wife's right of survivorship.

It has been held, also, that where the husband and wife each supply half the capital for investment in choses in action, and the investments have been taken in the joint names of both, upon the death of one, the other does not take all by survivorship. Matter of Albrecht, 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700 (1892); Wait v. Bovee, 35 Mich. 425 (1877).

comes into equity to compel a conveyance of the wife's choses in action, the court may require a provision for the wife to be made out of the property which they seek to reach, even to the extent perhaps of requiring the whole property to be applied to her benefit. Such was the case of Davis v. Newton, 6 Metc. 537, 543. It may also be true that, where a husband and wife are possessed of personal property per my et per tout, a court of equity will, for good reasons, protect the wife's right of survivorship by preventing the husband before he has done so from disposing of the property during their joint lives. Such was the case of Ward v. Ward, ubi supra, 14 Ch. Div. 506. But neither the principle of Davis v. Newton nor that of Ward v. Ward applies here. The wife's title by the entirety with her husband was not her separate property; and the husband has conveyed to the plaintiff, by an absolute conveyance for a valuable consideration, the whole title to the shares in question, as he has the right to do at common law, and has extinguished the wife's right of survivorship.

It is conceded that the mere fact that the certificate was placed in her possession by her husband gave her no additional rights.

We think that there should be a decree in favor of the plaintiff.

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APPENDIX

CASES

ON

MARRIAGE AND DIVORCE

BY

CHESTER G. VERNIER

PROFESSOR OF LAW IN THE COLLEGE OF LAW, UNIVERSITY OF ILLINOIS

PART IV

OF

KALES' CASES ON PERSONS AND DOMESTIC RELATIONS

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AUTHOR'S PREFATORY NOTE

THIS collection of cases on marriage and divorce is intended to supplement Kales' Cases on Persons. The writer has attempted to follow, in general, the method of treatment used by Mr. Kales. In so far as space has permitted, conflicting views have been developed and typical statutes set out. In addition, reference has been made to collections of statutes, and to articles suggesting the need of statutory reform. No attempt has been made to make the notes exhaustive, but frequent reference has been made to notes, articles, and texts where further cases may be found.

C. G. VERNIER.

COLLEGE OF LAW, UNIVERSITY OF ILLINOIS,
September, 1912.

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CASES ON MARRIAGE AND DIVORCE

(PART IV OF KALES' CASES ON PERSONS AND DOMESTIC RELATIONS)

CHAPTER I

MARRIAGE

SECTION 1.—THE PROMISE TO MARRY AND BREACH THEREOF

I. HISTORICAL [1]

26 GEO. II, c. 33, § 13· "XIII. And it is hereby further enacted. That in no case whatsoever, shall any suit or proceeding be had in any ecclesiastical court, in order to compel a celebration of any marriage in facie ecclesiæ, by reason of any contract of matrimony whatsoever, whether per verba de præsenti, or per verba de futuro, which shall be entered into after the twenty-fifth day of March in the year one thousand seven hundred and fifty-four; any law or usage to the contrary notwithstanding."

HOLCROFT v. DICKENSON.

(Court of Common Pleas, 25 Car. II, 1672. Carter, 233.)

An Action on the Case upon a Promise: The Plaintiff declares, that the 10th of November, 21 Car. II, in consideration she did assume and promise to marry the Defendant within a Fortnight, the

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[1] For additional historical matter the student is referred to Swinburne on Spousals (see especially at pages 231, 232, for a description of ecclesiastical and secular remedies previous to St. 26 Geo. II, c. 33, § 13); 6 Bac. Abr. 460–462 (Bouvier's Ed.); Howard, A History of Matrimonial Institutions, vol. II, pp. 200–203 (for breach of promise suits in the American colonies); 10 Law Quar. Rev. 135, article by J. Dundas White on "Breach of Promise of Marriage," tracing the origin of this action in England and Scotland and commenting on the important cases of Holcroft v. Dickenson, supra; Harrison v. Cage et ux., Carthew, 467 (1697), Hutton v. Mansell, 6 Mod. 172 (1703), etc.

Defendant did assume and promise within a fortnight to marry her; and says, That this hindered her preferment to her damage of 100 Pounds: Verdict for the Plaintiff. Arrest of Judgment.

Argued by the Court seriatim.

Ellis, Justice. It hath been moved in Arrest of Judgment, that the Action lies not.

1. Here is no consideration, except Spiritual matter, and such whereof our Law can take no notice; there is not Quid pro quo.

2. It is such a Consideration which is not possible in the power of the Defendant to perform: For in this case, without another Act to be done (that is to say) by the Priest, there can be no Marriage at all. Several Cases Have been put, Coke 4. fo. 29. Buntings Case, the Conusance of the right of Marriage doth belong to the Ecclesiastical Court. 7 H. VI. fo. 1. One bargained that another should have his Daughter; there was not Quid pro quo, 45 Ed. III. 24. If a man Covenant by Deed to marry such an one, it is good; if without Deed, it is of Ecclesiastical Conusance. 14 Ed. IV. 6. If a man promise £20. in marriage with his Daughter, it is of Ecclesiastical Conusance. If a man promise a certain sum of Money to another to marry his Daughter, no Action lies at Common Law: it is a cause of Matrimony, by Choke and Littleton, agreeing with the Master of the Rolls, 19 Ed. IV. 10. 20 Ed. IV. 3.

Notwithstanding the opinion of all these Books, I conceive the Action is well brought, and that Judgment ought to be given for the Plaintiff.

My Reason is, Here is a mutual Contract betwixt the parties about a lawful thing, and I hold it is not merely a Spiritual act. True, Ecclesiastical Courts have Conusance of it. If one pleads, Nient accouple en loyal Matrimony, they shall judge and bind us; but if he plead Nient sa feme, it shall be tried by Common Law. Anciently Marriage did not belong to the Ecclesiastical Court; not till the time of Pope Alexander the Third.

Selden will tell you what the rights of Marriage were originally, it was not a thing of Ecclesiastical Jurisdiction. If a Suit were in this Court concerning a Marriage to be executed in specie, we have nothing to do in it; when there is actus contra actum, Action will lye at Common Law. We bring not the Action to meddle with the Marriage, but for the Damages, that he hath not taken her according to his Promise. Fitzherbert N. B. 44. a. 120. K. Brook pl. 108. Action on the Case. Marriage is a consideration the Common Law takes notice of. If I covenant in consideration of Marriage, that I will stand seised, Ac. this will raise a good use, Plowd. 305. Fitzh. N. B. fo. 120. if one promise £20. to another to marry his Daughter, an action of Debt lies, Broke Debt. 107. Doctor & Stud fo. 104.

Later Authorities are full. Dyer 272. pl. 32. an action on the Case upon a promise of £20. made to the Plaintiff by the Defendant, in consideration the Plaintiff had taken to wife the Cozen of the Defendant, was good, with a special request laid.

I will give as much as I give with other my daughters; an Action on the Case lies against Executors, Crok Jac. Sanders and Esterby, Strecher and Parkers Case. after these times precedents are innumerable.

Therefore I hold Judgment pro Querente.

ATKINS, Justice. I am for Judgment for the Plaintiff.

It hath been strongly objected, that here is nothing in the Case, but that is of meer Ecclesiastical Conusance. In the ancient Year-Books the matter is much disputed, yet the Year-Books are with some distinction, 45 Ed. 3. 24. If the Promise to marry be by Deed, then its triable at Common Law, otherwise not if without Deed. Fitzh. N. B. 120. 17 Ed. IV. 45. b. 9 Ed. IV. 10. 22 Ass. pl. 70. By which you may see the Ancient Books are not agreeable in this point, 14 Ed. IV. 6. there the distinction is more nice. If the Defendant promise £20. to marry his Daughter, it is determinable at Common Law; but if the Defendant promise £20. with his Daughter, this ought to be sued in the Spiritual Court, 20 Ed. IV. fo. 3. Nele was there of a different opinion, and gave the Case of Tithes.

Later Authorities are full.

Object. This entitling the Common Law Courts to Promises of Marriage was in troublesome times.

Resp. Stretcher and Parkers Case was before the troublesome times, 14 Car. I. 1 Rolls Abr. 22. Hill. 14 Jac. 1 Rolls Abr. fo. 14. pl. 3, 4. Sanders and Esterby. Trin. 10 Car. Chapmans Case. Pasch. 5 Car. Nortons Case. It is not for us to go contrariant to these Judgments; that which toucheth Matrimony, whether lawful or not lawful, ought to be tried in the Spiritual Court; but in our case the Spiritual Court cannot give remedy for damages.

Object. Its not a temporal Damage.

Resp. It is: Marriage to a woman especially, is an advancement or preferment, 4 Rep. Ann Davies Case. Loss of Matrimony is a temporal loss, Trin. 22 Jac. B. R. 1 Rolls Abr. 35. Tonsons Case, and innumerable Cases more. I hold Judgment ought to be for the Plaintiff.

WINDHAM, Justice, pro Querente.

An Action upon the Case upon a Promise for a Portion, this is not our Case properly; and the Cases cited are put where Marriage was consummated. In our Case there is no Marriage, no way whereby the ecclesiastical Court can be entitled to it. The Books speak much of the consideration of the Act being grounded upon Ecclesiastical matter, that therefore it ought to be questioned there; yet the Books all agree, that if there be a temporal matter doth interpose whereupon the Action is grounded, remedy may be had at the Common Law; a man may sue for one thing in the Ecclesiastical Court, and at Common Law; too. One sues for a pension properly in the Spiritual Court; yet if it be upon a Grant by the Parson and Patron, he may sue for it at the Common Law; that Case 45 Ed. III. 24. which puts the distinction of a Deed and no Deed, I cannot understand the difference. For one is as much a temporal act as the other is; the Cases are infinite, You will not find a Case as ours is, where the Marriage is not consummated. As our Case is, I think the Action will lye: here is a mutual Promise. Mutual Promises are good Considerations to support Actions upon the Case; in our Case there is mutual Promise, and a Promise of Marriage too, than which is no greater Consideration.

Object. Here is an act to be done by another, and perhaps the party may be within Age.

Resp. Within Age shall not be presumed. If I undertake to do an act, whereto a third person must concur, I must procure him to do it. And there may be a very great temporal loss: Ann Davies Case; the ground of the Action there was for losing her preferment, Hobart p. 10. Griesly and Lowther. Rolls 1 Abridg. fo. 19. Hutton p. 17. 1 Rolls Abr. fo. 22. Stretch and Parker. This is clear Authority, and the Reason is clear, and grounded upon a future Promise. I hold Judgment ought to be given for the Plaintiff.

Chief Justice VAUGHAN, pro Defendente.

Actions upon the Case have increased much since the Queen's time. Late Authorities in the troublesom times are of no moment. The Case of Stretch and Parker in Car 1. is but a single Judgment. No question there are many Ecclesiastical matters upon which may be temporal Contracts. Now I shall come to shew how this matter doth differ from the other Cases. I shall first look over the Record.

1. I except to the Declaration: She saith, In consideration she had promised to take him to Husband, within two weeks space he promised to Marry her: But when she comes to alledge the matter in fact, that she was parata & abtulit se &c but saith not infra duas septimanas, as the Promise is.

2. Except. When one is to do an act, and a third person is requisite to that act, if one would intitle himself to an Action, he ought expressly to shew the act was so offered to be done as it ought to be done, as with a Priest and other circumstances in our Case. It is not said, she tendered at the Church, nor when any Minister was by.

Now to the Point.

A Promise to take one to Husband absolutely, notwithstanding any impediment; this is not a good Promise, and the impediments of Marriage are to be judged in the Spiritual Court; and this Reason differs this Case from the rest. If a man call another Heretick, an Action lies not here, because if the Defendant justifie, this Court cannot judge of it: And so is our Case, if she promised to marry him absolutely, and an action brought against her here she cannot alledge an Impediment, as she might do in the Ecclesiastical Court, and Promise in Question must be necessarily intended, if there were no impediment; the Book of 14 Ed. IV. 6. this is expressly by way of contract and not as a Marriage portion. The Judgment was final, and they all said it was of Ecclesiastical Conusance, 45 Ed. III. fo. 24. Covenant to marry by Deed is good, without Deed its of Ecclesiastical Conusance, 22 Ass. pl. 7. Det. Br. 134. is a sudden opinion, Fitzherberts Opinion hath led many into a mistake, 44 Letter E. its founded upon this very Book of 22 Assise, he not taking notice of the difference of Deed, and Without Deed.

Now I shall put this as a single Case.

The promise made by Mary was expressly to take him to Husband before such a time; its nudum pactum, and no Consideration. I shall agree according to the common Case. If A. is bound to enfeoffe B. by such a day, and B. refuseth, and the bond is sued, its a good plea to say he was ready and offered, and he refused: If Mary had entered into Bond to marry him by such a day, and he had sued it, it had been a good plea in this case for her to say, She offered and he refused. In our Case it is otherwise; this case is void for want of recompence, for the performance of a thing promised; this hath nothing in it but a bare Pactum.

The next thing to difference it from other Cases is this: She shall never have an Action unless she make it good on her part, and she can never make it good on her part as this Promise is; if she demand the recompence she doth perform her part; its necessary he perform his part, and then they are Man and Wife. No such act reciprocal is a good consideration in this case. One of full age marries one under age, she may dissent. In consideration you will promise to lye with me in the same Bed, I promise to lye in the same Bed with you. This is a parallel Promise, the performance of one part doth perform the other. In consideration you will hold my hand with yours, I will hold yours with mine. That which is supposed to be a Consideration, is a direct consequence; If you read a Deed in my hearing, I promise to hear it.

So for default in Pleading and other Reasons, I hold Judgment ought to be given for the Defendant.

II. FORM AND PROOF OF PROMISE

LEWIS v. TAPMAN.

(Court of Appeals of Maryland, 1900. 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.)

McSHERRY, C. J.[2] This is a suit to recover damages for a breach of promise to marry. That there was an agreement, of some sort, between the plaintiff and defendant to marry, is certain, but whether that agreement was absolute or conditional is one of the grounds of contention. It is insisted by the plaintiff that the defendant agreed to marry her within three years from a designated date; while, upon the other hand, it is alleged by the defendant that his promise was conditional, and that in no event was the promise set up by the plaintiff to be fulfilled until the expiration of three years from the time it was made. We need not, though it would be quite entertaining if we did, refer to the evidence bearing on these controverted issues of fact, and we need not refer to it, because the legal questions involved can be disposed of without quoting from the testimony. There is an inquiry suggested at the very threshold, and arising for the first time in Maryland, that may as well be considered and settled at once. Upon the assumption that the contract to marry was in fact made with a stipulation that it was not to be solemnized until after the expiration of three years, does it fall within that clause of the fourth section of the statute of frauds, which prohibits any action from being brought upon an agreement not to be performed within a year, unless the agreement be reduced to writing and be signed by the party to be charged therewith? This is the question which the rejected prayer interposed by the defendant, at the close of the case made by the plaintiff, and set forth in the ninth bill of exceptions, presents.

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[2] Part of the opinion is omitted.

A contract to marry was treated at common law, so Blackstone states (Book 1, p. 433), "in no other light than as a civil contract"; but it is in reality something more. Questions relating to marriage were, from a very remote period, cognizable only in the ecclesiastical courts, which had no authority to award damages, but imposed censures, as was supposed, for the welfare of the soul. It is curious and interesting to trace the conflicts between these courts and the common-law courts, and, in a measure, the court of chancery, in the efforts of the last-named tribunals to expand their jurisdiction, and correspondingly to restrict that of the former, over these contracts. This expansion gradually grew until the last remnant of the ecclesiastical court's jurisdiction was swept away by 20 & 21 Vict. c. 85, except as to the granting of licenses. As the ecclesiastical courts formerly possessed sole authority in questions relating to marriage (this was conceded by Lord Chief Justice Vaughan, 1 Cart. 233), but as they had no power in cases of a breach of promise other than to decree a performance of the marriage (4 Bac. Abr. tit. "Marriage and Divorce," 530), which jurisdiction was taken away by 26 Geo. 2, c. 33, the common-law courts, after the adoption of the statute of frauds, in 1676, began to entertain civil actions for a breach of a contract per verba de futuro, and that jurisdiction, Lord Chief Justice Raymond observed in 1733, "was a point not to be disputed." Holt v. Clarencieux, 2 Strange, 937. After considerable discussion, it was finally adjudged that the two courts could not act concurrently, but that, if an appeal were had to the ecclesiastical court to compel a performance, the common-law courts could not hear a suit for damages, and so e converso. The suit at common law was at first greatly opposed, because the party had his remedy in the spiritual court. But, notwithstanding this, it was resolved the party had his election of either remedy, and that by bringing an action at common law the remedy in the spiritual court was waived and released; "for now," as remarked by Lord Chief Justice Holt, "in lieu of performance of the contract he shall recover damages." Collins v. Jessot, Holt, 458. In another particular there was with respect to such contracts flat contradiction in the early cases. Philpott v. Wallet, 3 Lev. 65, decided in the thirty-fourth year of the reign of Charles the Second, and five years after the statute of frauds had been adopted, was the first case which held that a promise to marry was within the other clause of the fourth section relating to contracts made in consideration of marriage. But this construction was departed from and overruled 11 years later, in Harrison v. Cage, 1 Ld. Raym. 386, and is no longer the law, either in England or in Maryland. Cork v. Baker, 1 Strange, 34; Ogden v. Ogden, 1 Bland. 284. In the reign of Charles the First, the court of chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract to marry (Toth. 124, as cited in 2 Camp. Lives Ld. Ch. p. 138), but it does not appear that the power was ever exercised.

These conflicts of jurisdiction, these variant decisions, serve to emphasize, what is otherwise perfectly apparent, that there has always been about the marriage contract that which renders it different from any other contract known to the law. A recent writer thus describes that difference: "It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true, to a certain extent, since the law always presumes two parties of competent understanding, who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound, they are bound forever. Mutual consent, as in all contracts, brings them together, but mutual consent cannot part them. Death alone dissolves the tie, unless the legislature, in the exercise of a rightful authority, interposes, by general or special ordinance, to pronounce a solemn divorce." Schouler, Dom. Rel. § 13. And Mr. Justice Story, in his Conflict of Laws (section 108), though treating marriage as in its origin a contract of natural law, proceeds in note 3 to remark: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society. founded upon the consent and contract of the parties; and in this view it has some peculiarities, in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts."

So Fraser, while defining marriage as a contract, adds: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." 1 Fras. Dom. Rel. 87. A learned American writer (Bish. Mar. & Div. [6th Ed.] § 18) not only pronounces for this doctrine, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation. But this is not all. Prior to the adoption of our constitutional provision prohibiting the legislature from passing special laws granting divorces, it had been the custom of the general assembly to divorce, by statute, from the bonds of marriage, and this court held that such legislation could "be viewed in no other light than as regular exertions of legislative power." Crane v. Meginnis, 1 Gill & J. 474. What other contract can the legislature annul? Even the inhibition in the federal constitution, which denies to a state the power to pass any law impairing the obligation of a contract, does not prevent the dissolution of the marriage contract by an act of assembly. "It never has been understood," said Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 519, 4 L. Ed. 629, "to restrict the general right of the legislature to legislate on the subject of divorce." Marriage, holds the supreme court in a much later case, is not a contract, within the meaning of the prohibition in the federal constitution against the impairment of contracts by state legislation. Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

It is true that many of the observations just quoted from the text writers refer to the marriage relation or status, and it is also true that there is a distinction between the contract of marriage and a contract to marry. But the terms, "contract of marriage" and "contract to marry," are used to express the same idea, though, perhaps, it may not be strictly accurate to so use them. There is no reason for distinguishing "the contract of marriage," if by that term is meant the marriage relation, from all other contracts, that does not equally apply to the contract to marry, which precedes and is a foundation of the consummated agreement. As the contract of marriage or the contract to marry, treating them as identical, is so essentially different from every other contract known to the law, it cannot be assumed that parliament, by the use of the words "any agreement," intended to include the contract to marry within the prohibition contained in the clause of the fourth section of the statute of frauds, which requires an agreement that is not to be performed within a year to be reduced to writing As we have seen, no action was maintainable in the common-law courts on an agreement to marry when the statute was passed. Such an agreement was obviously not one of the contracts then contemplated by the lawmakers as being within the statute. The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract. The relation it has in view is wholly distinct from the relation which any other contract could contemplate. The capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement. It can only be made between a man and a woman. It has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it.

Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor, and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir Frederick Pollock observed in Hall v. Wright, El. Bl. & El. 793: "I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind, and is supported by no authority."

The fact that parties to a breach of promise suit could not testify until 32 & 33 Vict. c. 68, gave them the right to do so, in England, made it exceedingly improbable that a specific contract to marry at a time more than a year from the date of entering into the agreement could be proved at all, except in rare instances, particularly as the method of proving a contract to marry differs very materially from the mode of proving any other contract. The parliament knowing, as it must be presumed that it did know, that it had not been definitely settled, when the statute of frauds was passed, that a suit at common law could be brought for a breach of promise to marry, it is scarcely legitimate to infer that a contract to marry, the precise terms of which were rarely, if ever capable of exact proof, was designed to be included within the provision of the statute. Looking, then, to the nature of the contract to marry, to its origin, its antiquity, and its objects, and having regard to the early method of enforcing it in the spiritual courts, and considering how distinct it is, in all the particulars we have indicated, from every other kind of contract which can be entered into, and bearing in mind that it is, as Lord Robertson, a distinguished Scottish judge, declared, "the very basis of the whole fabric of civilized society," we are unwilling to say that it falls, or was intended to fall, within the term "any agreement," as that term is used in the statute of frauds.

There were three American cases cited by the appellant's counsel in support of the contention that a contract to marry, if not to be performed within a year, is unenforceable under the statute. These were Derby v. Phelps, 2 N. H. 515; Nichols v. Weaver, 7 Kan. 373; Ullman v. Meyer (C. C.) 10 Fed. 241. On the other hand, we were referred by the appellee's counsel to Brick v. Gannar, 36 Hun, 52, and we have found Blackburn v. Mann, 85 Ill. 222, which sustain the opposite view. But no English case was called to our attention, and, after a diligent search, we have discovered none on either side of the question. In Blackburn v. Mann, supra, the court say: "Contracts of marriage, although defined as civil contracts, are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. Contracts of marriage, until a breach is shown that terminates them, may be regarded as continuing contracts by consent of the parties, and hence are, in no just sense, within the statute of frauds."

The cases relied on by the appellant turned upon the construction of the state statutes involved, which are not identical in phraseology with the statute of 29 Car. II. It is stated in 3 Pars. Cont. p. 3, that, although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied. But in Maryland the statute of 29 Car. II. is in force, not because there is any enactment transcribing it, but because of the provisions of article 5 of the declaration of rights, which declares that the inhabitants of Maryland are entitled to the benefit of such of the English statutes in force in the state on the 4th day of July, 1776, as have been found applicable to their local and other circumstances. In Ullman v. Meyer, supra, it was conceded by District Judge Wallace that, "as an original proposition, it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are," he went on to say, "agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them."

But, after all, "a contract not to be performed within a year, and specifically so agreed, is the only one within this clause." Dennison, C. J., in Fenton v. Emblers, 3 Burrows, 1278. There was evidence in the cause that the contract to marry was to be performed within three years, and there was no evidence of a specific agreement that it should not be performed within a year. According to all the cases, if there was a possibility of its being performed within a year, and there was no stipulation that it should not be, then the contract would not be within the statute, even though it had relation to a subject-matter to which the statute was applicable. Cole v. Singerly, 60 Md. 348; Ellicott v. Peterson's Ex'rs, 4 Md. 476. * * *

For the reasons we have given, the judgment, which was for the plaintiff, will be affirmed. Judgment affirmed, with costs above and below.[3]

DERBY v. PHELPS.

(Supreme Court of New Hampshire, 1822. 2 N. H. 515.)

This was an action of assumpsit on a promise of marriage. At the trial here, under the general issue, and a plea of the statute of limitations, the plaintiff proposed to prove, that in A. D. 1811, the defendant, being about to commence the study of his profession, desired the plaintiff to receive his addresses as a suitor, and at the end of about five years, when he expected to be settled in business, to marry him; and that, in pursuance of this offer, his addresses were received, and continued till the defendant's marriage with another lady, in A. D. 1820.

This evidence was objected to, as within the statute of frauds; but having been admitted, a verdict was found for the plaintiff, subject to future consideration on the validity of the above objection.

Woodbury, J.[4] Our statute "to prevent frauds and perjuries" provides, among other things, "that no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, or upon any agreement, that is not to be performed within the space of one year from the time of making it, unless such promise or agreement" "be in writing." 1 N. H. Laws 178.

The defendant cannot avail himself of the first clause above cited; because, though once decided in Philpott vs. Wallet, 3 Lev. 65, that a contract to marry must in all cases be in writing; yet, that decision has since been overruled in Cork vs. Baker, 1 Stra. 34, and in Harrison vs. Cage and wife. 1 Ld. Ray. 386. Salk. 24. 5 Mod. 411. Bull N. P. 280. 2 Equ. Ca. Ab. 248. Skin. 196.

This clause of the statute is now held to reach not mutual promises to marry,[5] but only promises for other things made in consideration of marriage. Bac. Ab, "Agreement," C. 3.

But under the other clause of the statute, we apprehend the objection to the evidence must be adjudged fatal. This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been, that the contract should be fulfilled on a certain event, which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. 1 Salk. 280. Skin. 326. Stra. 34. Burr. 1278. 1 Bl. Rep. 353. 1 Ld. Ray. 317. Com. Rep. 49. Holt, 326. 3 Salk. 9. Moore v. Fox, 10 Johns. (N. Y.) 244, 6 Am. Dec. 338.

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[3] For adverse comment on this case, see note in 14 Harv. Law Rev. 63.

[4] Part of the opinion is omitted.

[5] To same effect, see Browne, Stat. of Frauds (5th Ed.) § 215a; Reed on Statute of Frauds, § 186, and cases cited.

But such was not the tenor of it. Nor can this description of contracts be taken out of the statute by the circumstances, that when the original statute of frauds passed under Charles the II., these contracts were not sued at law, but were merely the subject of proceedings to compel a performance of them in the ecclesiastical courts. For numerous kinds of contracts, not then in use and not then prosecuted in the common law courts, have since had birth under the new exigencies and improvements of society, and are all brought to the test of the general provisions of the statute.

In respect to a part performance of this contract, which doubtless, if proved, might cure the absence of any writing, Bac. Ab. "Agreement," C., and Auths. there cited, the case as saved presents no question of this kind, and, according to our recollection, none such was raised at the trial.

Should this be relied on hereafter as an answer to the statute, it will then be early enough to decide what ought to be considered a part performance of a contract, on whose rites and ceremonies, and their respective importance in perfecting a marriage, so much diversity of opinion exists. * * *

New trial.[6]

WIGHTMAN v. COATES.

(Supreme Judicial Court of Massachusetts, 1818. 15 Mass. 1, 8 Am. Dec. 77.)

Assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman.

At the trial on the general issue, at the last November term before Parker, C. J., the evidence of a promise resulted from sundry letters written to the plaintiff by the defendant, and from his attentions to her for a considerable length of time.

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[6] In the following cases, also, promises not to be performed within a year were held to be within the statute: Nichols v. Weaver, 7 Kan. 373 (1871); Paris v. Strong, 51 Ind. 339 (1875), semble; Ullman v. Meyer (C. C.) 10 Fed. 241 (1882).

In Brick v. Gannar, 36 Hun, 52 (1885), the court, construing the New York act in the light of its title, "Of fraudulent conveyances and contracts relative to goods, chattels and choses in action," held a similar promise not to be within the statute. In speaking of Ullman v. Meyer, supra (which also arose under the New York statute), the court says: "The learned judge in that case overlooked the title of the statute." The court also comments on Derby v. Phelps and Nichols v. Weaver, supra, in which there were no words of limitation in the title of the statutes involved.

In Blackburn v. Mann, 85 Ill. 222 (1877), it was also held that a similar promise was not within the statute, on the theory that the contract was a continuing one.

It was objected by the defendant, that there being no direct evidence of an express promise, the action could not be maintained.

This objection was overruled by the judge; and the jury were instructed that if, from the letters of the defendant read in evidence, and the course of his conduct towards the plaintiff, they were satisfied that there was a mutual understanding and engagement between the parties to marry each other, they might find for the plaintiff, which they did.

If the said direction was right, judgment was to be rendered on the verdict; otherwise a new trial was to be granted.

PARKER, C. J., delivered the opinion of the Court. Respectable counsel having expressed doubts upon the point reserved in this case, and having also suggested an opinion that the action was of a nature to be discountenanced rather than favored,[7] we have given more consideration to the case, than our impression of the merits of the objections would have required.

We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connexion with another—the affections being so far interested as to render a subsequent engagement not probable or desirable—and one of the parties wantonly and capriciously refuses to execute the contract, which is thus commenced; the injury may be serious, and circumstances may often justify a claim of pecuniary indemnification.

When the female is the injured party, there is generally more reason for a resort to the laws, than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages according to the injury sustained. A deserted female, whose prospects in life may be materially affected by the treachery of the man, to whom she has plighted her vows, will always receive from a jury the attention which her situation requires;

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[7] In a note in 7 Harv. Law Rev. 372, may be found a more recent expression of a similar opinion. It is there suggested that the action for breach of promise of marriage is anomalous and seems peculiar to the common law. That it is really a suit in tort with heavy punitive damages, sometimes used as a method of blackmail, forces a commercial view of a matter not properly regarded as a matter of trade, and brings into undue publicity feelings not properly the subject of judicial investigation. "If it is not to be abolished, at least the proof of the promise should be regulated. There is a serious lack of consistency in requiring written proof of a contract of sale of goods worth $50 or so, and allowing a woman to recover $40,000 or more on her own parol testimony strenuously denied by the man."

and it is not disreputable for one, who may have to mourn for years over lost prospects and broken vows, to seek such compensation as the laws can give her. It is also for the public interest, that conduct tending to consign a virtuous woman to celibacy, should meet with that punishment, which may prevent it from becoming common. That delicacy of the sex, which happily in this country gives the man so much advantage over the woman, in the intercourse which leads to matrimonial engagements, requires for its protection and continuance the aid of the laws. When it shall be abused by the injustice of those who would take advantage of it, moral justice as well as public policy dictate the propriety of a legal indemnity.

This is not a new doctrine. As early as the time of Lord Holt, it was enforced, as the common law, by that wise and learned judge and his brethren, that a breach of promise of marriage was a meritorious cause of action. 3 Salk. 16, Hutton v. Mansell. 2 Comyns on Contracts, 408. And although the value of a marriage in money might have had some influence in that decision, there is no doubt that the loss sustained in other respects,—the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the consequences of desertion after a long courtship,—were considered to be as legitimate claims for pecuniary compensation, as the loss of reputation by slander, or the wounded pride in slight assaults and batteries.

Nor is this English law become obsolete. It is the common law of our country, always recognized when occasions have offered; and the occasions have not been unfrequent since the adoption of our constitution. 3 Mass. 189, 3 Am. Dec. 122, Boynton v. Kellogg. In the case of Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95, Chief Justice Parsons says: "As the law now stands, damages are recoverable for a breach of promise of marriage."

Several actions of this nature have been before this court, since I have been upon the bench, and I remember several when I was in practice at the bar, in which I was counsel. Indeed there is no country, in which the relative situation of the sexes, and their joint influence on society, would render such a principle of jurisprudence more useful or necessary.

As to the technical ground, upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence, from which such a promise may have been inferred; and the jury were instructed that if, from the letters written by the defendant as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn.

Is it then necessary, that an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they considered themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse, which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex, or the interests of society.

A mutual engagement must be proved, to support this action: but it may be proved by those circumstances, which usually accompany such a connexion. No case has been cited, in support of the defendant's objection. On the contrary, it is very clear from all the English cases, that a promise may be inferred, and that direct proof is not necessary. In the case before referred to of Hutton v. Mansell, Lord Holt says expressly, that where one has promised, and the behavior of the other is such as to countenance the belief that an engagement has taken place, this is evidence enough of a promise on the part of the person so conducting; and the same principle will apply to both the parties.

In the present case, however, the evidence on which the jury relied, was of a decisive nature; for the letters of the defendant, which were submitted to them, were couched in terms which admit only of the alternative, that he was bound in honor and conscience to marry the plaintiff, or that he was prosecuting a deeply laid scheme of fraud and deception, with a view to seduction. The jury believed the former, and in so doing, have vindicated his character from the greater stain; and he ought to be content with the damages, which they thought it reasonable to assess for the lighter injury.

Judgment on the verdict.[8]

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[8] In Daniel v. Bowles, 2 C. & P. 553 (1826), defendant declared his love for plaintiff in the presence of plaintiff's mother, obtained the mother's consent, and made some arrangements for the marriage. Plaintiff said nothing, but continued to receive defendant's visits in the capacity of a suitor. Best, C. J., said: "I think that her being present, and not making any objection, coupled with what happened afterwards, shews that she consented, and would be sufficient to enable the defendant to maintain an action against her. It would be indelicate to expect that she should consent in words. No doubt the Jury must be satisfied that there were mutual promises; but I think there is evidence from which they may be inferred." Plaintiff received a verdict for £1,500.

In Homan v. Earle, 53 N. Y. 267 (1873), Church, C. J., said: "Contracts of marriage are unlike all others. They concern the highest interests of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. As matter of law the learned judge was clearly right in holding that no formal language is necessary to constitute the contract of marriage. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they have arrived at that state. The authorities both in this country and England establish this doctrine. Hutton v. Mansell, 6 Mod. 172; Hickey v. Campion, 20 Weekly R. 752; [Southard v. Rex-

III. CIRCUMSTANCES VITIATING CONSENT OR EXCUSING PERFORMANCE

WILD v. HARRIS.

(Court of Common Pleas, 1849. 7 C. B. 999.)

Assumpsit for a breach of promise of marriage. * * * At the trial, before Maule, J., at the sittings in Middlesex, after the last Hilary term, a verdict was found for the plaintiff, damages £10.[9]

WILDE, C. J. This was a motion in arrest of judgment. The action was for a breach of promise of marriage; and the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, promised to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; it then went on to aver, that the plaintiff remained sole and unmarried, and had always been ready and willing to marry the defendant, but that the defendant disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise. On behalf of the defendant, it has been contended, that, inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise,—so that the plaintiff was not bound by her promise to marry the defendant,—there was a total absence of consideration.

But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time,—which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do: and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time, was not absolutely impossible of performance; for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff. The authority referred to by my Brother Cresswell in the course of the argu-

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ford] 6 Cow. 254; [Wells v. Padgett] 8 Barb. 323; [Hotchkins v. Hodge] 38 Barb. 117; [Hoitt v. Moulton] 21 N. H. 586; [Kniffen v. McConnell] 30 N. Y. 285; 5 Wils. & Shaw, 144; 2 Dow. & Clark, 282."

In Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908), it was held that testimony of the woman that there was a promise of marriage was sufficient, even though uncorroborated, and though denied by the man. For other cases on the weight and sufficiency of the evidence necessary to prove the promise, see the following: Clark v. Pendleton, 20 Conn. 495 (1850); Judy v. Sterrett, 52 Ill. App. 265 (1893); Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672 (1834); Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125 (1897); Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100 (1893); Edge v. Griffin (Tex. Civ. App.) 63 S. W. 148 (1901); McKee v. Monser, 131 Iowa, 203, 108 N. W. 228 (1906).

[9] Part of the statement of the case is omitted, as it appears sufficiently in the opinion.

ment,—from Brooke's Abridgment,[10]—seems to recognise the principle which must govern this case. There, a woman infeoffed a man, upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married; whereupon the original feoffor entered as for condition broken; and it was held that it was a lawful condition; for, that the feoffee's wife might have died within a reasonable time. It would be strange indeed, to allow the defendant to rely upon his own wrong,—to set up his fraudulent concealment of his marriage,—in order to discharge himself from his promise; the plaintiff having performed her part of the consideration, by remaining unmarried, and ready to marry the defendant, until she discovered that he was already a married man. We therefore think there is no ground for the application.

Rule refused.[11]

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[10] The reference referred to is Brooke's Abr. title "Conditions," p. 119. This professes to be an abridgement of the case in 40 Ass. 13.

[11] Pollock, C. B., in Millward v. Littlewood, 5 Exch. 775 (1850), in referring to the principal case, said: "Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a Court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection, which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good."

The following cases, in which plaintiff was ignorant of defendant's marriage, are in accord with the principal case: Millward v. Littlewood, 5 Exch. 775 (1850); Daniel v. Bowles, 2 C. & P. 553 (1826); Davis v. Pryor, 3 Ind. T. 396, 58 S. W. 660 (1900); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Stevenson v. Pettis, 12 Phila. (Pa.) 468 (1877); Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706 (1870); Cammerer v. Muller, 60 Hun, 578, 14 N. Y. Supp. 511 (1891), affirmed in 133 N. Y. 623, 30 N. E. 1147 (1893); Carter v. Rinker (C. C.) 174 Fed. 882 (1909).

In Coover v. Davenport, supra, it was held error for the trial court to charge the jury that plaintiff would forfeit all right to recover if, after learning of defendant's existing marriage, she did not repudiate the contract, but was still willing to carry it out in a reasonable time. Nicholson, C. J., said: "To hold that she lost her right to full damages by delaying to sue under such circumstances would be to hold that defendant could avail himself of his fraud in procuring her to delay, in order to relieve himself of his liability for damages for the original fraud in procuring from her a promise of marriage. So far from being relieved from the liability growing out of his original fraud, by exerting his power over her to induce her not to repudiate the contract on her part, he estopped himself from relying on such a defense, if she delayed at his urgent request, or if she did so in consequence of his false and fraudulent representations."

BLATTMACHER v. SAAL.

(Supreme Court of New York, 1858. 29 Barb. 22.)

Appeal by the defendant, from a judgment of the city court of Brooklyn. The complaint alleged that on or about the 1st day of May, 1857, the plaintiff, being then sole and unmarried, and competent to contract to marry, and the defendant representing himself to be sole and unmarried, and competent to contract to marry, and also representing his name to be John Sauer, did, in consideration of the promise of the plaintiff to marry said defendant, then faithfully promise to marry the plaintiff; and that the plaintiff, confiding in said representations and promise, hath from that time to this remained, and still is, sole and unmarried. That the plaintiff had no knowledge, or information sufficient to form a belief, that any of said representations of the defendant were false, or that said promise of the defendant to marry the plaintiff was fraudulent, at the time of the making of said mutual promise to marry. The plaintiff further alleged that the said representations of the defendant were false, and made with the intention to deceive and injure the plaintiff; the real name of said defendant being John A. Saal, and that he then was, for many years had been, and still is, a married man; and that the promise by said defendant to marry the plaintiff was fraudulent, and to the injury and damage of the plaintiff to the amount of ten thousand dollars, for which sum the plaintiff demanded judgment against the defendant, together with the costs of the action.

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the city court, on argument; and no answer having been put in, judgment was ordered for the plaintiff, and her damages were assessed by a sheriff's jury as $5,000.

By the Court, EMOTT, J. This complaint states sufficiently the promise to marry by the defendant, and his representation that he was unmarried, and competent to marry the plaintiff. It was obviously unnecessary to allege that he knew this representation to be untrue, when he is alleged to have been in fact married. It then avers that the plaintiff, confiding in this representation and promise, continued, and still is, unmarried, and that she had no knowledge or information to lead her to believe that the promise and representation of the defendant were false or fraudulent, and it avers a breach of the defendant's representation and promise, and damages.

This is a good cause of action, and if the plaintiff cannot recover for the deceit and damage—a question on which it is not necessary to express an opinion at present—she certainly may upon the contract and promise to marry, which implied and involved a promise and agreement, that the defendant was competent legally to marry. It is said that the performance of the agreement was impossible and illegal. But this was unknown to the plaintiff, and her agreement was not illegal. It was to marry the defendant, if he was, and believing him to be, unmarried. It cannot be possible that she may not recover the damages which she has sustained in consequence of having innocently made this engagement, and remained unmarried to perform it. The parties are not in pari delicto, and the defendant must restore the plaintiff to what she has lost by his deceit, and his promise to do what he could not legally perform.

What he agreed to do was not an act illegal in itself. If it had been, no action could have been maintained upon the promise. But he promised to do an act which it was unlawful for him to consummate with the plaintiff, only because he was legally disqualified from doing it and this was unknown to the plaintiff.

There are two cases in the English courts directly in point, Wild v. Harris, 7 C. B. 999, and Millward v. Littlewood, 1 Eng. L. & E. 408. The reasoning of the Barons of the Exchequer in the latter case, particularly the opinion of Baron Parke, is entirely satisfactory to us.

The judgment of the city court must be affirmed; but the defendant may withdraw his demurrer, and put in an answer within ten days after notice of the filing of the remittitur, on payment of all the costs since the demurrer. The judgment may stand as security.[12]

EVE v. ROGERS.

(Appellate Court of Indiana, 1895. 12 Ind. App. 623, 40 N. E. 25.)

Ross, C. J. This was an action brought by the appellee, in the Floyd Circuit Court, against the appellant, to recover damages for the breach of a marriage contract. The venue of the cause was changed to the Clark Circuit Court, where, upon a trial by jury, a verdict was returned in favor of appellee.

The specifications of error assigned in this court are as follows:

"First. The court erred in overruling the demurrer to the substituted and amended complaint.

"Second. The court erred in overruling the appellant's motion for a new trial."

The first specification has not been argued, and for that reason is considered waived.

Under the second specification, which calls in review the ruling of the court in overruling appellant's motion for a new trial, several questions are presented, namely: Whether or not the evidence is sufficient to sustain the verdict; whether or not the court erred in admitting in evidence a certified copy of a decree of the Floyd Circuit Court, and whether or not the damages assessed are excessive.

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[12] In Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881), also, it was held that tort for deceit was a proper action.

See, also, Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411 (1895), where defendant, who was already married, married plaintiff, who was ignorant of the existing marriage; the court holding that tort for deceit would lie, as a logical result of Pollock v. Sullivan, supra.

Counsel, while admitting that the appellee testified that the appellant promised to marry her, insist that her testimony, as shown by the record, fails to prove a contract.

In this position we think counsel are in error. True the evidence is uncertain as to the time when the contract was entered into, and time, in this case, is a very material question, for if the contract was entered into prior to June 1, 1890, and at a time when appellee was a married woman, it was void for want of mutuality. The contract must be binding upon both parties, or it can not bind one. Hence it follows that a contract to marry, entered into between a man and a woman, one of whom is qualified to make such a contract and the other is not, is void, and can not be enforced. Neither can damages be recovered for a breach thereof, for the reason that the contract, not being binding as to the one, is not binding as to the other.[13]

The evidence, as it comes to us, is in narrative form, and although, as heretofore stated, is not clear as to when the promise was made, is sufficient on that question to sustain the verdict.

The court did not err in admitting in evidence the certified copy of the decree of the Floyd Circuit Court, granting appellee a divorce from her husband, Charles P. Rogers. By this we do not mean to be understood as holding that the mere introduction of the copy of the decree, without the other proceedings of the court or the pleadings in the cause, was all that was necessary, but what we do hold is that the certified copy of the decree was competent evidence, and proper to be given to the jury. Anderson v. Ackerman, 88 Ind. 481.

This brings us to a consideration of the remaining question, namely: Are the damages excessive?

We recognize and appreciate the force of the rule so well settled, viz. that this court will not reverse a judgment on account of the amount of damages assessed in an action of this character, unless the amount assessed clearly appears to have been the result of prejudice, partiality, or corruption; yet, when upon an examination of the evidence, it appears to the mind of the court that the damages assessed are so excessive and unjust that the jury, in assessing them, must have been influenced by passion, prejudice or partiality, or have proceeded upon a wrong principle, a new trial will be ordered.

The damages assessed in this case, in view of the evidence, are excessive, and a new trial should be granted.

Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

Gavin, J., dissents.

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[13] See Carter v. Rinker (C. C.) 174 Fed. 882 (1909), for comment on the above language.

PADDOCK v. ROBINSON.

(Supreme Court of Illinois, 1872. 63 Ill. 99, 14 Am. Rep. 112.)

LAWRENCE, C. J. This was an action for a breach of promise of marriage. On the trial the court, against the objection of defendant, permitted the plaintiff to prove promises of marriage made at a time when both parties were married and known to be so by each other. We can not understand how an action can be maintained on such a promise. It can not be performed except upon the death or divorce of the husband of the one party, and the wife of the other; and to hold that it is valid because it may be performed in such a contingency, would be to introduce into social life a dangerous and immoral principle. Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a court of justice.

We find no case in which this question has been expressly decided. Counsel for appellee cites Chitty on Contracts, 587, where it is said that the promise of a married man to marry within a reasonable time is not void, although he was married at the time of making such promise, because his wife might have died within such reasonable time. But on examining the authorities on which the text is based, and which are cited by the author, namely, Wild v. Harris, 7 C. B. 999, and Millward v. Littlewood, 5 Exch. 775, we find, in both cases, the plaintiff was not aware that the defendant had a wife living at the time of making the promise. The same was true in Daniel v. Bowles, 2 C. & P. 553.

We fully concur in these decisions. The plaintiff was an innocent party. She did not know she was listening to immoral professions or accepting a promise which the promisor had no right to make. In such cases, courts may well hold that the promisor can not avail himself of his fraudulent concealment of his marriage as a defense to an action upon the contract. In the case before us, neither party was innocent. Both knew their contract of marriage was essentially immoral.

For the error in permitting the plaintiff to prove the promises of marriage made while the plaintiff's husband and the defendant's wife were living, and known to be so by both parties, the judgment must be reversed and the cause remanded.

Judgment reversed.[14]

NOICE v. BROWN.

(Supreme Court of New Jersey, 1875. 38 N. J. Law, 228, 20 Am. Rep. 388.)

On demurrer to the declaration.

Argued at November Term, 1875, before BEASLEY, Chief Justice, and Justices DEPUE and VAN SYCKEL. The opinion of the Court was delivered by

BEASLEY, Chief Justice. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. The counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I can not see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonial obligations. Nor can he do so in the hope of a divorce. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

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[14] Accord: Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579 (1901).

In Haviland v. Halstead, 34 N. Y. 643 (1866), plaintiff knew when the promise was made that defendant had been divorced for adultery, and prohibited from marrying again, and that his former wife was still living; held that defendant's promise to marry was void by statute.

The demurrer must be sustained.[15]

HANKS v. NAGLEE.

(Supreme Court of California, 1879. 54 Cal. 51, 35 Am. Rep. 67.)

Appeal from a judgment for the plaintiff, and from an order denying a new trial, in the Twentieth District Court, County of Santa Clara. Belden, J.

The facts are stated in the opinion.

By the Court: This is an action for a breach of promise of marriage. The alleged promise is denied by the answer. The plaintiff was examined as a witness in her own behalf, and testified in substance that the agreement between the parties was, that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterward marry her. "He promised me that if I should give up myself to him, that he should marry me."

"Q. What did you say to that?"

"A. At first I refused; at last I, of course, gave myself up to him."

First. Upon well settled principles the plaintiff should not have recovered upon a contract of this character. As being a contract for illicit cohabitation, it is tainted with immorality. Story on Cont. § 458; Steinfeld v. Levy, 16 Abb. Prac. N. S. (N. Y.) 26, and other authorities cited in appellant's brief.

Second. But this question was not made below, nor is the record here in such a condition as would, under the settled rules of practice, permit us to determine the case upon this point.

Third. But the Court below, in stating to the jury "the elements of injury which go to make up the sum total of damage" which the plaintiff might be considered to have sustained, instructed them as follows: "Next, if * * * the defendant, taking advantage of the promise under which she (the plaintiff) was acting, has had illicit relations, and has seduced the plaintiff, that is another element proper for the jury to consider," etc. But the evidence which we have just detailed, coming as it did from the mouth of the plaintiff herself, shows that this case is not one of the character assumed by the Court as the basis for this instruction. It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of a female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage. It is clear, therefore, that the hypothesis upon which this instruction was based could not be assumed by the jury for the purpose of fixing the amount of damages the plaintiff was to recover.

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[15] In Gulick v. Gulick, 41 N. J. Law, 13 (1879), where a statute made absolutely void the marriage of a person incurably impotent, it was held that no action would lie for breach of promise of marriage made by such a person to one who knew of his condition.

In Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900), it was held that a promise to marry on the death of defendant's divorced wife was not condemned by public policy, there being no legal impediment in the way of an immediate marriage.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.[16]

WILSON v. CARNLEY.

(King's Bench Division, 1907. 23 Times Law Rep. 578.)

This was the argument of a point of law raised on the pleadings in an action for damages for alleged breach of promise of marriage. The statement of claim alleged that the defendant verbally promised on June 19, 1894, to marry the plaintiff upon the death of the defendant's wife, who was then living, and that the promise was verbally ratified and renewed by the defendant at Easter, 1897, and that in January, 1906, the defendant's wife died, but that the defendant refused to marry the plaintiff. The defendant denied the alleged promise and the alleged ratification or renewal. He further pleaded that the alleged promise and renewal and ratification were contrary to public policy and good manners, and were illegal and void, and in the alternative that the plaintiff had released and discharged him from the alleged promise, and that the plaintiff had conducted herself in a manner inconsistent with the maintenance of any engagement by publishing libels of the defendant.

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[16] Accord: Goodall v. Thurman, 1 Head (Tenn.) 209 (1858); Boigneres v. Boulon, 54 Cal. 146 (1880); Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797 (1892); Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633 (1894); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467 (1903).

In the preceding cases the promise to marry was given for a promise to engage in future illicit intercourse. Compare with the following cases in which promises to marry were exchanged, followed by illicit intercourse, which it was held did not vitiate the promise to marry: Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Powell v. Moeller, 107 Mo. 471, 18 S. W. 884 (1891); Judy v. Sterrett, 52 Ill. App. 265 (1893); Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126 (1900); Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024 (1903).

Compare, also, Hotchkins v. Hodge, 38 Barb. (N. Y.) 117 (1862), in which the illicit intercourse came first, followed by a promise to marry, which was held valid.

Mr. Justice CHANNELL, in giving judgment, said that there was really no authority upon the point. The statement of Chief Baron Pollock was apparently not agreed to by Baron Parke, and was only a dictum, as it was not necessary for the decision of the case. As against that there was some ancient and not very intelligible authority, which Chief Baron Pollock seemed to have thought was against his view, and which Baron Parke certainly thought was against the view of the Chief Baron. He had no doubt that the reason why there was no authority was that in practice such a question never arose in the abstract form in which it was now before him, because when such promises were in fact made they were generally accompanied by immorality, and were not binding. He had to decide whether a promise by a married man to marry another woman on the death of his wife, the woman to whom he made the promise necessarily knowing that he was a married man was, as an abstract proposition, contrary to public policy.

Assuming that the ground of such promise being said to be contrary to public policy was that it was inconsistent with the affection which ought to exist between a husband and wife, he thought that was not necessarily so, as for example in the case of a man's wife being in a lunatic asylum or in a case where a man's wife asked him in the event of her death to marry a particular person. It is impossible to lay down the abstract proposition that such a promise as the one now in question was necessarily void as being contrary to public policy; and it was not desirable at the present day to introduce new grounds of illegality of that kind, for it had been frequently held that the doctrine of illegality on grounds of public policy should not be extended. On the whole he was not prepared to decide this point of law in favour of the defendant so as to stop the action, as it was impossible to say, as an abstract proposition, that the promise was invalid or illegal. The case must, therefore, go for trial.[17]

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[17] See judgment of Lord Coleridge accord, in same case after trial, in Wilson v. Carnley, 23 L. T. R. (K. B. Div.) 757 (1907).

Compare Spiers v. Hunt, 24 L. T. R. (K. B. Div.) 183 (1907), contra. In this case Phillimore, J., said: "My Brother Channell, in Wilson v. Carnley, supra, thought that there might be cases in which there would be no mischievous tendency, or not so much mischief, and he instanced cases in which the other consort was an incurable lunatic, or the promise was made at the deathbed and upon the request of the dying consort, and therefore he declined to decide as a matter of law that such a promise could never be enforced. I have not to deal with such cases, and my decision does not necessarily cover them; it may be that the rule is general, but not universal. Where there is confirmed lunacy there may be no injury to the lunatic consort, but there remains the objection of probable sexual immorality. In the other case, if the consort be indeed on a deathbed, there is no palpable danger; but as Chief Justice Best said, when it was attempted for other

BAKER v. CARTWRIGHT.

(Court of Common Pleas, 1861. 10 C. B. [N. S.] 124.)

The declaration stated that the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed, and the plaintiff had always been ready and willing to marry the defendant; yet the defendant had neglected and refused to marry the plaintiff; and the plaintiff claimed £500.

The defendant pleaded—first, that he did not promise and agree as alleged; secondly, a denial of the breach of contract alleged; thirdly, that he entered into the said agreement in the declaration mentioned upon the faith and under the belief that the plaintiff had been and was of sound mind, and had never been afflicted with insanity, and had never been legally confined as a lunatic in a lunatic asylum, whereas the plaintiff, before the making of the said agreement, had been and was of unsound mind, and had been legally confined as a lunatic in a lunatic asylum, which the defendant first discovered after making the said alleged agreement and before the alleged breach thereof, wherefore the defendant then refused to marry the plaintiff, which was the alleged breach.

The plaintiff joined issue on the above pleas; and, for a second replication to the third plea, said that the unsoundness of mind therein mentioned existed only for a short time, to wit, four months, and that after she had been confined in the lunatic asylum as in that plea mentioned, and before the making of the said agreement, she the plaintiff became and was and from thence hitherto had been of sound mind, and had been and was legally discharged from the said lunatic asylum.

She also demurred to the third plea, the ground of demurrer stated in the margin being, "that the fact of the plaintiff having been legally in a lunatic asylum is no justification for the breach of the defendant's promise." Joinder.

The defendant demurred to the second replication to the third plea, the ground of demurrer stated in the margin being, "that the replication confesses the allegations in the defendant's plea, and it is no sufficient ground of reply, that, before the agreement, the plaintiff became of sound mind, and was legally discharged from the lunatic asylum." Joinder.

Macnamara, for the plaintiff.

purposes to insist upon approaching death as creating a peculiar legal position, it would be difficult to establish a rule which would settle the degree of approaching death, and more difficult to ascertain by evidence when the case was within that degree."

The principal case was overruled, and Spiers v. Hunt, supra, approved, in Wilson v. Carnley (Court of Appeals) 24 L. T. R. 277 (1908). See, also, note criticising principal case in 21 Harv. Law Rev. 58.

Overend, Q. C. (with whom was Daly), contra. The object of this sort of contract is as well to acquire the close intimacy of a companion for life as the lawful propagation of the species. This object would evidently be not only entirely frustrated, but would probably entail mischief on the community by perpetuating hereditary disease of the most painful character, if such a defense as this were not allowable. A person afflicted with such a malady,—a recurrence of which is always to be apprehended,—can never be fit properly to discharge the duties of a wife and a mother. There can be no good reason why sanity should not be as much an implied exception in such a contract as chastity.

Earle, C. J. The general doctrine laid down by the Exchequer Chamber, in the case referred to,[18] is, that the contract binds, and that want of chastity is the only exception. That being so, I think we are bound to hold that the third plea of the defendant in this case affords no answer, and consequently there must be judgment for the plaintiff.

Williams, J. I am entirely of the same opinion. No fraud is alleged.[19]

The rest of the court concurring.

Judgment for the plaintiff.[20]

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[18] The case referred to is Beachy v. Brown, 1 El., Bl. & El. 796 (1860). Cockburn, C. J., in this case said: "I agree that there are many things which a man might desire to have communicated to him, if they existed, at the time of making the contract, such as that the plaintiff is in debt, or subject to other liabilities, or some circumstances relating to her person, her temper, her disposition, the discovery of which would yet not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things; and yet it has never been held that the discovery of them justified a party in breaking his contract. Where it turns out that a woman is of unchaste conduct, which goes to the very root of the contract of marriage, there, from the excess and necessity of the case, the man is released from his contract. But nothing of the sort is disclosed here; there is no imputation on the virtue or honour of the plaintiff, and the case does not fall within the principle which makes the misconduct of the woman an answer to the action."

[19] In regard to what constitutes fraud or fraudulent concealment, see Van Houton v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373 (1894), where Morton, J., said: "The jury were correctly instructed that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life, and that the parties would be bound, if they became engaged without making any investigations, and without receiving any assurance or representations which led to the engagement, even though matters were discovered subsequently, which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery. Whether the only matters which would give the defendant such a right were those relating to the chastity of the plaintiff, we have no need now to consider. * * * And later they were told that the defendant was not bound if the contract was procured by deception or by fraud, or by concealment which was fraud, but that there was no fraudulent concealment by simply not communicating infor-

[20] See note 20 on following page.

IV. SUBJECT NOTES

(A) Whether the Action for Breach of Promise Survives

In the early and leading case of Chamberlain v. Williamson, 2 Maule & S. 408 (1814), Lord Ellenborough held that the action did not survive the death of plaintiff, where the declaration contained no allegation of special damage. Following this case, it has generally been held that the action does not survive the death of either plaintiff or defendant. Stebbins v. Palmer, 1 Pick. 71, 11 Am. Dec. 146 (1822), rule not changed by St. 1842, c. 89, according to Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Grubb v. Sult, 73 Va. 203, 34 Am. Rep. 765 (1879); Hayden v. Vreeland, 37 N. J. Law, 372, 18 Am. Rep. 723

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mation, that a promise would be valid, though made in complete ignorance of the antecedents of the parties, but that there was a different doctrine where matters were inquired about, and that, if either party made inquiries of the other with reference to family, position, or circumstances in the life or experience of the other, then, if willful false statements were made with reference to any of those things which might fairly be considered as entering into the judgment of either party as to whether that party would or would not enter into a contract of marriage, then there would be a false representation. 'That is,' the court continued, 'a statement which the party knows is false, or makes as true of his or her own knowledge, when it is in fact untrue, and without knowing that it is true, or if there is concealment of any such particular which is inquired about, those circumstances will be sufficient to make void a contract entered into in consequence and relying upon them, unless they are of such a nature that no man would be justified in the exercise of any reasonable care in relying upon these statements.' These instructions might, and probably would lead the jury to infer that concealment on the part of the plaintiff would not constitute fraud, except as to matters that were inquired about by the defendant. But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and if she willfully concealed and suppressed such facts and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. Kidney v. Stoddard, 7 Metc. 252; Short v. Currier, 153 Mass. 182 [26 N. E. 444]; Burns v. Dockray, 156 Mass. 135, 137 [30 N. E. 551]; Prentiss v. Russ, 16 Me. 30; Atwood v. Chapman, 68 Me. 38, 40, 41 [28 Am. Rep. 5]; Potts v. Chapin, 133 Mass. 276; Clark v. Baird, 9 N. Y. 183; Brown v. Montgomery, 20 N. Y. 287 [75 Am. Dec. 404]; Devoe v. Brandt, 53 N. Y. 462; Hill v. Gray, 1 Stark. 434; Stevens v. Adamson, 2 Stark. 422; Arkwright v. Newbold, 17 Ch. D. 301, 317, 318; Aortson v. Ridgway, 18 Ill. 23; Add. Torts (Wood's Edition) 1205. Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters, which would have prevented the engagement if known, would not constitute fraud on her part. Potts v. Chapin, ubi supra. But a partial and fragmentary disclosure, accompanied by the willful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation. Arkwright v. Newbold, ubi supra."

Van Houten v. Morse is also reported in 26 L. R. A. 430, with a note on "Effect of Fraudulent Concealment to Avoid Promise of Marriage."

[29] On disease or illness as an excuse for nonperformance of the promise to marry, see the cases cited below. The following cases hold that the diseases mentioned, whether in plaintiff or defendant, if unknown to the other party, at the time of promise, constitute no defense: Hall v. Wright, 1 El., Bl. &

(1875); Hovey v. Page, 55 Me. 142 (1867); Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183 (1825); Frazer v. Boss, 66 Ind. 1 (1879), construing 2 Rev. St. 1876, p. 309, § 783; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250 (1874); Weeks v. Mays, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212 (1889), construing Milliken & V. Code, § 3560; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757 (1899), construing Shannon's Code, § 4569; Larocque v. Conheim, 42 Misc. Rep. 613, 87 N. Y. Supp. 625 (1904).

In the following cases it was held that the action survived: Shuler v. Millsaps 71 N. C. 297 (1874), and Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444 (1882), construing Battle's Rev. St. c. 17, § 65; Stewart v. Lee, 70 N. H. 181, 46 Atl. 31 (1899), construing Pub. St. 1891, c. 191, §§ 8–14. And in Johnson v. Levy, 118 La. 447, 43 South. 46, 118 Am. St. Rep. 378, 9 L. R. A. (N. S.) 1020, 10 Ann. Cas. 722 (1907), it was held that the action survived where promisor was put in default by demand. See note to this case in 9 L. R. A. (N. S.) 1020.

(B) *Damages in Suits for Breach of Promise*

As to the various elements of damages, injury to feelings, reputation, loss of time, expenses incurred in preparation, loss of reasonable expectation, etc., see the following cases: Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547 (1858); Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Harrison v. Swift, 13 Allen (Mass.) 144 (1866); Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936 (1883); Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581 (1895); Poehlmann v. Kertz, 105 Ill. App. 249 (1902), affirmed in 204 Ill. 418, 68 N. E. 467 (1903); Grubbs v. Pence, 73 S. W. 785, 24 Ky. Law Rep. 2183 (1903); Graves v. Rivers, 123 Ga. 224, 51 S. E. 318 (1905).

To the effect that evidence of defendant's reputation for wealth is admissible on the question of damages, see Hunter v. Hatfield, 68 Ind. 416 (1879); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880); Stratton

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El. 746 (1858) (bleeding of the lungs); Smith v. Compton, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480 (1902) (urinary complaint).

Contra: Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581 (1899) (urinary complaint); Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. Rep. 166 (1892), (syphilis); Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444 (1882) (venereal disease); Gardner v. Arnett, 50 S. W. 840, 21 Ky. Law Rep. 1 (1899) (syphilis); Kantzler v. Grant, 2 Ill. App. 236 (1878) (venereal disease); Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302 (1900) (venereal disease).

See, also, Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314 (1886), where structural malformation was held an excuse; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242 (1890), where physical incapacity (nature not disclosed) was held an excuse; Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467 (1903), where a voluntary submission to an unnecessary surgical operation by plaintiff, whereby she became incapable of procreation, was held to excuse defendant; and Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192 (1906), where defendant became engaged to plaintiff with full knowledge that plaintiff had consumption in an incurable form, and it was held that defendant was excused on grounds of public policy.

See comment on Grover v. Zook, in 7 Col. Law Rev. 135. Also see note in 16 Harv. Law R. 604, suggesting a classification of disease for the purpose of defense, and 37 Am. Law Rev. 226, article by C. H. Huberich on "Venereal Disease in the Law of Marriage and Divorce."

A collection of cases on ill health as a defense to an action for breach of promise to marry, and a discussion of the subject, may also be found in a note to Grover v. Zook, supra, in 7 L. R. A. (N. S.) 582.

v. Dole, 45 Neb. 472, 63 N. W. 875 (1895); Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784 (1891); Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557 (1903).

Contra: Johansen v. Modahl, 4 Neb. (Unof.) 411, 94 N. W. 532 (1903).

Plaintiff may show circumstances of contumely and aggravation attending the breach of the promise, as fact that friends have been invited to the wedding, Reed v. Clark, 47 Cal. 194 (1873); slanderous statements of defendant, Chesley v. Chesley, 10 N. H. 327 (1839).

The seduction of plaintiff by virtue of the promise may also be shown to aggravate the damages. Tubbs v. Van Kleek, 12 Ill. 446 (1851); Haymond v. Saucer, 84 Ind. 3 (1882); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wilber v. Johnson, 58 Mo. 600 (1875); Kniffen v. McConnell, 30 N. Y. 285 (1864); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906); Sramek v. Sklenar, 73 Kan. 450, 85 Pac. 566 (1906), etc.

Contra. Perkins v. Hersey, 1 R. I. 493 (1851); Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912 (1906); Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159 (1845).

Where defendant in bad faith tried to prove that plaintiff was unchaste and entirely failed, it was held that this might be considered in aggravation of damages. Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293 (1898); Liese v. Meyer, 143 Mo. 547, 45 S. W. 282 (1898). In Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25 (1897), it was so held, although the charge was made in good faith. See note criticising the case in 11 Harv. Law Rev. 268.

To mitigate damages defendant may show that plaintiff's loss is less than claimed, as by showing that plaintiff is unchaste, Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783 (1901); that defendant is inflicted with an incurable disease, Sprague v. Craig, 51 Ill. 288 (1869). Whether defendant may show that after breach he renewed his offer of marriage is doubtful. That he can, see Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441 (1846); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881). That he cannot: Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880).

(C) When the Right to Sue Accrues; Statute of Limitation

Where the promise is to marry at a fixed time, and the promise is renounced before the time fixed, it is generally held that suit may be brought at once, following the leading case of Frost v. Knight, L. R. 7 Ex. 111 (1872). See, to this effect, Sheahan v. Barry, 27 Mich. 217 (1873); Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516 (1870); Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Adams v. Byerly, 123 Ind. 368, 24 N. E. 130 (1890); Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 (1900); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47 (1896); Zatlin v. Davenport, 71 Ill. App. 292 (1897); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906).

Some of the cases above base the decision upon the doctrine of anticipatory breach as laid down generally in Hochster v. De la Tour, 2 El. & Bl. 678 (1853). Others, while dissenting from the general doctrine of anticipatory breach, apply it to promises to marry.

Suit may also be brought at once, where defendant disables himself (as by marriage to another) from carrying out his promise. Short v. Stone, 8 Q. B. 358, 15 L. J. Q. B. 143 (1846); Clements v. Moore, 11 Ala. 35 (1847); Sheahan v. Barry, 27 Mich. 217 (1873); Hunter v. Hatfield, 68 Ind. 416 (1879); Schroeder

v. Michal, 98 Mo. 43, 11 S. W. 314 (1889); McCarville v. Boyle, 89 Wis. 651, 62 N. W. 517 (1895); Kerns v. Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367 (1892); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900).

Where no time for performance is fixed, the right to sue accrues after a reasonable time. Stevenson v. Pettis, 12 Phila. 468 (1877); Blackburn v. Mann, 85 Ill. 222 (1877). It was also held in the latter case that, where the parties through a period of years treat the contract as a continuing one, no right to sue accrues until one of the parties breaks the engagement.

The period of limitation begins to run from the time of breach, and not from the time of contract. Hanson v. Elton, 38 Minn. 493, 38 N. W. 614 (1888); Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466 (1903).

SECTION 2.—MARRIAGE AS A CONTRACT OR RELATION

I. NATURE OF MARRIAGE

N. Y. CONSOL. LAWS 1909, c. 14, § 10: "Marriage, so far as its validity in law is concerned, continues to be a civil contract,[21] to which the consent of parties capable in law of making a contract is essential."

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[21] Many other states have statutes declaring that marriage is a "civil contract," or that it is a personal relation growing out of a civil contract. For a few of these statutes see: Colorado, 2 Mills' Ann. St. 1891, § 2988; Georgia, Civ. Code 1895, § 2412; Iowa, Code 1897, § 3139; Louisiana, Rev. Civ. Code, art. 90; Michigan, 3 Comp. Laws 1897, § 8589; Minnesota, Rev. Laws 1905, § 3552; Missouri, Rev. St. 1899, § 4311; Oklahoma, St. 1903, § 3482; Wisconsin, Rev. St. 1898, § 2328.

On the nature of marriage, see, also, Randall v. Kreiger, 23 Wall. 137, at page 147, 23 L. Ed. 124 (1874), where Swayne, J., said: "Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one sui generis. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation."

See, also, Ditson v. Ditson, 4 R. I. 87, at page 101 (1856), where Ames, C. J., said: "Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which

BURNS' IND. ANN. ST. 1908, § 7289: "Marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not nearer of kin than second cousins, and not having a husband or a wife living, are capable of entering."

CAL. CIV. CODE, § 55 (as amended by Laws 1895, p. 121): "Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code."

II. Formality

(A) At Common Law and under Statute

DUMARESLY v. FISHLY.

(Court of Appeals of Kentucky, 1821. 3 A. K. Marsh. 368.)

The Chief Justice delivered the opinion.

This was an action for slanderous words. The defendant pleaded that the plaintiff is and was, at the emanation of the writ, his lawful wife; to which the plaintiff replied, traversing the allegations of the plea, and issue was thereupon joined to the country.

it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution."

And in Noel v. Ewing, 9 Ind. 37, at page 49 (1857), Stuart, J., used the following language: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate. The sovereign power may, by general enactment, regulate and mold their relative rights and duties at pleasure."

For other comment on the nature of marriage, see Keyes v. Keyes, 22 N. H. 553 (1851), Adams v. Palmer, 51 Me. 480 (1863), and especially Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 (1888), in which case, and other cases cited therein, it was held that marriage is not a contract within the meaning of the clauses in the federal and state Constitutions forbidding legislation impairing the obligation of contracts.

On the trial of the issue in the circuit court, it appeared from the evidence that, some time previous to the commencement of the suit, a license for the marriage of the plaintiff and defendant had been issued by the clerk of the county court of Jefferson county, with the consent of plaintiff's father, and that the marriage ceremony was performed at the house of her father in Jeffersonville, in the state of Indiana, where she resided, by the reverend Mr. Chabrat, a priest of the Roman Catholic religion, who had previously obtained from the county court of Nelson county in this state, where he resided, a testimonial authorizing him to celebrate the rites of matrimony; but that the defendant declined cohabiting with the plaintiff, and that the marriage had not been consummated.

After the evidence was closed on both sides, the counsel for the defendant moved the court to instruct the jury, that if they believed the whole evidence in relation to the intermarriage of the plaintiff with the defendant, and that the marriage had been celebrated between the plaintiff and defendant before the commencement of this suit at Jeffersonville, in the state of Indiana, and not in Jefferson county in this state, the marriage was nevertheless valid, and that in that case they should find for the plaintiff. The court, with the assent of the plaintiff, reserved the point, not being prepared to give an opinion, and the jury gave a verdict for the plaintiff, subject to that opinion. The court, after taking time to consider, decided that the law was for the defendant on the point reserved, and rendered judgment accordingly; to which the plaintiff excepted, spreading the whole evidence in detail upon the record, and has brought the case to this court by an appeal.

As the marriage was entered into in the state of Indiana, the question in relation to its validity, must, no doubt, be decided by the laws of that state. Whether, however, we consider the question with reference to the laws of Indiana or this country, the result will be the same. For the statute of that country, regulating marriages, which was read on the trial in the circuit court, and made a part of the record by the bill of exceptions, appears, as to its effect upon the point now in controversy, not to differ materially from the statute of this country upon the same subject, and the common law is in force in that as well as in this country, so far as it has not been altered or repealed by statute. It is obvious that the marriage between the parties in this case was not celebrated according to the provisions of the statute of either country. It was not done according to the provisions of the statute of this country, because the female party did not reside in the county, from the clerk's office of which the license was issued; and it was not done according to the statute of Indiana, because the license was not issued by the proper officer of that state.

But neither the statute of Indiana nor that of this state avoids a marriage not celebrated according to its provisions. The object of the legislature of both states was manifestly, not to declare what should be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it; for the legislature speaks not of the validity of the marriage, but of the celebration of its rite, and addresses itself, not to the parties themselves, but to the functionaries whom it authorizes to perform the requisite ceremonies in solemnizing the marriage. In short, the legislature of either state has done nothing more than substitute a statutory mode of solemnizing the rites of matrimony, instead of the common law mode of doing it in facie ecclesiæ; and it was necessary to do this, because there was in this country no church established by law, and consequently none that had authority to solemnize the rites of matrimony. The effect, therefore, of the statutory mode of solemnizing matrimony must be precisely the same, with respect to the validity of a marriage in this country, as the common law mode with respect to the validity of a marriage in England. We are then led to enquire what the doctrine of the common law is, upon this subject.

Marriage is nothing but a contract; and to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract—willing to contract, and should actually contract. A marriage thus made without further ceremony, was, according to the simplicity of the ancient common law, deemed valid to all purposes and such continued to be the law of England until the time of Pope Innocent the Third, when the ceremony of celebrating matrimony in facie ecclesiæ was first introduced into that country. That ceremony, however, though introduced by the usurpation of the church, was afterwards recognised to a certain extent by the common law; and it would have been idle for the law to have recognised the ceremony without attaching to it any legal consequence. It was therefore held, that to constitute a marriage de jure, and render it valid to every purpose, it must be celebrated in the church. But a marriage contracted without that ceremony, was, nevertheless, a marriage in fact, and was still deemed valid to most purposes. Baron and Feme 3, 4, and 5, 2 Salk. 437, and 2 Black. Com. 439; Johnson's Rep. 52.

Even in the ecclesiastical courts, a marriage de facto was not held to be void; for if the parties afterwards cohabited, they were not liable to be punished for fornication; and if either of them married another, such second marriage, though celebrated in facie ecclesiæ in due form, was deemed void ab initio.

And if in those tribunals by whose encroachments upon the civil authority, the ceremony of solemnizing in facie ecclesiæ was introduced, a marriage without that ceremony was deemed valid to some purposes, we would naturally expect that the courts of common law would regard such a marriage with still more indulgence. We accordingly find that, except in certain real actions, it was held not to be necessary to place a marriage de jure. For it was only in those cases that the plea of ne ungues accouple in loyal matrimony which put in issue, the legality of the marriage was admissible. In all personal matters and causes, a marriage de facto was sufficient, and in such cases the plea of ne ungues accouple in loyal matrimony was inadmissible. Baron and Feme, 44, 45.

Hence in the case of Alleyn and wife against Gray, 2 Salk. 437, which was an action of debt on a bond, the plea of ne ungues accouple in loyal matrimony was held bad on demurrer, not only because it changes the mode of trial, but because it admits a marriage but denies the legality of it; whereas, a marriage de facto is sufficient, and whether legal or not legal, is not material. So in an action of trespass brought by A against B and C. B pleaded that C is the wife of the plaintiff, and demanded judgment of the writ. The plaintiff replied ne ungues accouple in loyal matrimony, which was held bad, and he was driven to say she was not his wife, for if she was his wife in fact, it was sufficient. Baron and Feme, ubi supra.

So in an action for criminal conversation, it is sufficient to prove a marriage in fact, though the evidence arising from cohabitation and reputation is not admissible to prove such marriage. And even in an indictment for bigamy, a marriage in fact is sufficient to warrant a conviction in case of a record marriage. Com. Dig. tit. Baron and Feme, letter B, and the cases there cited.

In fine, in every shape in which the question has been presented to the courts of common law in personal actions, or in relation to personal matters, a marriage in fact has been deemed valid. A contrary doctrine, in this country, would be attended with the most mischievous consequences. The statute prescribing the mode of celebrating the rites of matrimony, requires that when either party is under the age of twenty-one, the consent of the parent or guardian shall be given in person or in writing, that bond and security shall be given before license can be issued; that license shall be issued only by the clerk of the county where the female party resides; and that no clergyman who has not previously obtained testimonials for that purpose from the county court, shall celebrate the rites of matrimony. A compliance with the whole of these particulars is necessary to render the marriage conformable to the statute; and a failure to comply with any one of them, would render it but a marriage in fact; and if a marriage in fact be void, many of the marriages of the country would be so, for there are many in which there has been a failure either intentionally or otherwise, to comply with some one or more of the formalities presented by the statute. A doctrine which would thus tend to vitiate a great proportion of the marriages of the country would result in incalculable evils, and cannot be admitted to be correct.

But admitting a marriage in fact to be valid, it is contended that to constitute such a marriage, consummation is necessary; and it is inferred, as the marriage in this case was not consummated by cohabitation, that it does not amount even to a marriage in fact.

The position assumed in this argument is absolutely untenable. It is neither founded on reason nor supported by authority. By the law of nature, the contract of marriage is complete without consummation. 1 Rutherford's Inst. 345; and it is a maxim of the common law, borrowed, it is true, from the civil law, but founded upon the reason and nature of the thing, "that consensus, non concubitus facit matrimonium." Co. Lit. 34; 1 Black. Com. 433.[22]

Marriage and cohabitation are two things. The latter is the object to be obtained by the former, and to make it lawful, must be preceded by the former. It is said, indeed, that a marriage contracted per verba de futuro, which is in truth nothing but a promise to marry in future, is a valid marriage if the parties afterwards cohabit; but the cohabitation, even in that case, does not constitute the marriage. It is only evidence of the marriage; and the same authorities which say that a contract per verba de futuro becomes a marriage if the parties afterwards cohabit, invariably lay down the doctrine that a marriage per verba de præsenti is, forthwith, a marriage, and complete without cohabitation.

Upon the whole, therefore, a majority of the court are of opinion that it was sufficient for the defendant to support the issue on his part, to prove a marriage in fact; and that the marriage proved in this case was of that character.

The decision of the point reserved by the circuit court was, therefore, correct, and the judgment must be affirmed.

MILLS, J., dissented.[23]

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[22] Accord: Dalrymple v. Dalrymple, 2 Hagg. Consist. 54 (1811); Jackson v. Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563 (1831); Port v. Port, 70 Ill. 484 (1873), semble; Hebblethwaite v. Hepworth, 98 Ill. 126 (1881), semble; Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 732, 95 Am. St. Rep. 821 (1902). However, a present assumption of the marriage status is necessary. McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641 (1899); Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609 (1900); Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777 (1906).

[23] The dissenting opinion of MILLS, J., is omitted. The following extract gives his point of view: "And it is said in Salk. 437, 438, that such is the rule of the canon law. This case in Salk. by mistake has been quoted as declaring it a rule of the common law by subsequent authorities. Assuming then the fact, that such a rule was incorporated into the common from the canon law, it was one of the effects produced by corrupt religious establishments, of the same character with the principle, that a marriage by the priest could never be dissolved by human authority. When we adopted the common law of England, it was only so far as suited our local situation, and was compatible with the genius and spirit of our government. I would, then, select from it the most sound and liberal principles, and cast away not only all the maxims of ecclesiastical establishments, but doubt and also reject such parts as were tainted by canonical mixtures. In a word, I would say that the common law on this point was corrupted by too long a subjection to spiritual usurpation, and that we did not adopt it into our code, and that it is not in this respect obligatory on the court. I would take this case as one primæ impressionis in this country, and subject it to the rules of all other contracts."

CHENEY v. ARNOLD (1857) 15 N. Y. 345, 69 Am. Dec. 609,[24] Denio, C. J.: "The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the judge consequently committed an error in submitting the question to the jury whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character; as he maintains that in either case they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to become husband and wife in præsenti, but there was an agreement to be married in futuro, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married and the plaintiff is legitimate, otherwise she is not.

"There is a dictum by Judge Cowen, in Starr v. Peck, 1 Hill, 274, which fully sustains the plaintiff's position; but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties; and the verdict affirmed the existence of a marriage. There was no evidence of a contract, present or future, and it was as easy for the jury to find the one as the

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Cases holding that statutes, prescribing formalities and imposing penalties, are to be construed as directory only, are very numerous. Only a few are cited below. With a few exceptions all states have at one time or another recognized the so-called common-law marriage. See 2 Poll. & Mait. History of Eng. Law, 366–377; 1 Bl. 439; 1 Bishop, Mar., Div. and Sep. §§ 384–449. For exhaustive discussion of English law, see Queen v. Millis, 10 Cl. & F. 534 to 907 (1843).

The following American cases recognize informal marriages: Carmichael v. State, 12 Ohio St. 553 (1861); Port v. Port, 70 Ill. 484 (1873); Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198 (1866); Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164 (1875); Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245 (1876); Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359 (1877); Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826 (1877); Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742 (1884); State v. Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556 (1887); White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799 (1890); Bailey v. State, 36 Neb. 808, 55 N. W. 241 (1893); Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821 (1902); Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353 (1905); Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96 (1907). And see notes in 2 L. R. A. (N. S.) 353, and 15 L. R. A. (N. S.) 463.

On common-law marriage as affecting bigamy, see note in 20 Harv. Law Rev. 576. On marriage of slaves, see Bish. Mar., Div. and Sep. §§ 646-679, note in 9 Harv. Law Rev. 223, and the following cases: Irving v. Ford, 179 Mass. 216, 60 N. E. 491 (1901); Waff v. Sessums, 28 Tex. Civ. App. 183, 66 S. W. 865 (1902); Johnson's Heirs v. Raphael, 117 La. 967, 42 South. 470 (1906); Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123 (1906); Ex parte Romans, 78 S. C. 210, 58 S. E. 614 (1907).

[24] This was an action by husband and wife, to recover a farm, claimed by plaintiffs, in the right of the wife. The case turned upon the legitimacy of the plaintiff, Mrs. Cheney. A verdict was rendered for defendant, and from a judgment thereon plaintiffs appealed. Judgment for defendant affirmed. Only part of the opinion is given.

other. What was said by the learned judge as to a contract per verba de futuro was obiter. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: 'If the contract be made per verba de præsenti and remains without cohabitation, or if made per verba de futuro and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary.' 2 Com. (2d Ed.) 86. Blackstone too says that in cases of cohabitation, contracts per verba de futuro were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate them in facie ecclesiæ. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us marriage is simply a civil contract, differing, it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent executory or executed. If executed, that is, if the parties agree eo instanti to take each other for husband and wife, it is ipsum matrimonium. If executory in its terms it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages. If it were like some other common law contracts, an action in the nature of a bill in equity might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically, and we have no tribunals corresponding with the English ecclesiastical courts, which did formerly exercise such a jurisdiction. Burtis v. Burtis, Hopk. Ch. 557, 14 Am. Dec. 563. Our courts have all the jurisdiction of the English common law and equity courts which has not been denied them by the legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that if parties agree to marry and one of them refuse to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties or confer any rights upon the issue of such connection. * * * It follows that the doctrine of the canon law, that a contract of marriage per verba de futuro, followed by carnal intercourse, was a valid marriage, did not become the law of this state by force of our adoption of the common law of England, for it was not a part of that common law." [25]

HULETT v. CAREY.

(Supreme Court of Minnesota, 1896. 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419.)

MITCHELL, J.[26] Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 13, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal property, pursuant to the statutes in such case made and provided. On September 13, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside and declared not to be the last will and testament of the deceased. In this petition she alleged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage.

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[25] See 1 Bish. Mar., Div. & Sep. § 370 et seq., for criticism of the principal case, compare statement of Deady, J., in Holmes v. Holmes, 1 Abb. (U. S.) 525, at 538, Fed. Cas. No. 6,638 (1870): "Assuming the promise per verba de futuro to be so proved, it is maintained that this engagement and the subsequent copula amount in law to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law assumes the copula was allowed on the faith of the marriage promise; and that so the parties, at the time of the copula, accepted each other as husband and wife. The proposition is substantially stated in the words of Bishop on Marriage and Divorce, § 90, where it is laid down that in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such consent is to be presumed when the copula follows upon a promise to marry in the future. But this doctrine is directly denied in Cheney v. Arnold, 15 N. Y. 345 [69 Am. Dec. 609]. * * * It must be admitted that there are some dicta of American jurists to the contrary of this case, and in accord with the rule maintained by Bishop; but Cheney v. Arnold is later than these dicta, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor Walworth in Rose v. Clark, 8 Paige Ch. (N. Y.) 579, that at common law no marriage was valid unless celebrated in facie ecclesiæ."

For varying statements concerning marriage per verba de futuro compare the following: Richard v. Brehm, 73 Pa. 140, 13 Am. Rep. 733 (1873); Duncan v. Duncan, 10 Ohio St. 181 (1859); Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702 (1880); Port v. Port, 70 Ill. 484 (1873); Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887); Reg. v. Millis, 10 Cl. & F. 534, 782 (1843); Hooper v. McCaffery, 83 Ill. App. 341 (1898).

[26] Part of the opinion is omitted.

Both petitions alleged, and it is an admitted fact, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material, on which it was asked that the probate of the will be vacated, was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892: "Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy." The probate court decided adversely to the petitioner, and denied both her petitions, whereupon she appealed to the district court in both cases.

Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. * * *

The second finding of fact in each case was to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on the 7th of January, 1892 (the date of the execution of the marriage contract), and on the 25th of July, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on the 7th of January, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc.; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals.

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged.

Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in verba de præsenti, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law.

The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract jure gentium, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de præsenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. p. 87; 2 Greenl. Ev. § 460; 1 Bish. Mar. & Div. §§ 218, 227–229. The maxim of the civil law was "Consensus non concubitus facit matrimonium." The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. §§ 239, 313, 315, 317. See, also, the leading case of Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject.

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. Dalrymple v. Dalrymple, supra. The only two cases which we have found in which anything to the contrary was actually decided are Reg. v. Millis, 10 Clark & F. 534, and Jewell v. Jewell, 1 How. 219, 11 L. Ed. 103, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

Counsel for appellants contend, however, that the law is otherwise in this state; citing State v. Worthingham, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, per verba de præsenti, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents"; citing Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed per verba de præsenti to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage.

In State v. Worthingham, supra, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it.

The case of Hutchins v. Kimmell, supra, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife.

Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Id., 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations."

In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do. * * *

The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; as, for example, as to the power of the probate court to set aside the probate of a will. In the appeal from the judgment setting aside to the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed. In the other appeal the judgment setting aside the probate of the will, and adjudging such will to be of no force or effect, is reversed.[27]

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[27] In Sorenson v. Sorenson, 68 Neb. 483, 103 N. W. 455 (1905), where a secret common-law marriage was claimed, it was held that the facts failed to show a marriage, the court saying: "Our marriage laws aim at publicity. To allege that these laws have been disregarded, and that a secret marriage has been entered into, is to cast suspicion upon the conduct of the parties."

Many of the cases discussing common-law marriage are concerned largely with the question of proof of the marriage or with presumptions growing out of matrimonial habit and repute. But whether the marriage is ceremonial or informal, it is held in civil cases generally that neither record proof nor proof by an eyewitness is needed to prove a marriage and that one can be shown by evidence of matrimonial habit and repute. For detailed rules, see Wig. Evidence, § 2082 et seq. See, also, the following cases: Goodman v. Goodman, 28 L. J. Ch. 745 (1859); Collins v. Bishop, 48 L. J. Ch. 31 (1878); In re Shepherd, 73 L. J. Ch. 401 (1904); Senge v. Senge, 106 Ill. App. 140 (1903); Smith v. Fuller (Iowa) 108 N. W. 765 (1906). In Bell v. Clarke, 45 Misc. Rep. 272, 92 N. Y. Supp. 163 (1904), it was held that more evidence would be required to establish a marriage to a woman of dissolute character than in the case of a woman of chaste character. In in Re Maher's Estate, 183 Ill. 61, 56 N. E. 124 (1899), it was held that the presumption of a common-law marriage, arising from the fact of cohabitation and repute, may be overcome by subsequent conduct of the parties indicating that their relations were meretricious. That the evidence of matrimonial reputation must be general, see Ashford v. Metropolitan Life Ins. Co., 80 Mo. App. 638 (1899); Eldred v. Eldred, 97 Va. 606, 34 S. E. 477 (1899); Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809 (1899). But "reputation" to establish marriage is not a word denoting extent of territory. The opinion of a few immediate neighbors, who make up the social circle, outweigh the negative testimony of a thousand citizens who know nothing about the matter. In re Comly's Estate, 19 Pa. Co. Ct. Rep. 184 (1897).

It has been held in some cases that a conviction of bigamy cannot be sustained by showing a first marriage merely by habit and repute. But the weight of authority is against this distinction, either by decision or statute. See Wig. Evid. § 2085, and a note criticising the distinction in 20 Harv. Law Rev. 576. For a recent case contrary to the distinction, see State v. Thompson, 76 N. J. Law, 197, 68 Atl. 1068 (1908).

BEVERLIN v. BEVERLIN.

(Supreme Court of Appeals of West Virginia, 1887. 29 W. Va. 732, 3 S. E. 36.)

SNYDER, J.[28] Suit in equity, instituted November 20, 1884, by Elizabeth Beverlin against Israel A. Beverlin, in the circuit court of Taylor county, for a divorce a mensa et thoro, and for alimony. * * *

The circuit court in its final decree, entered April 1, 1886, decided in favor of the plaintiff, awarding her a divorce a mensa et thoro from the defendant, and requiring him to pay to her $250 annually for her support. From this decree the defendant has appealed.

The first question to be considered is whether or not any marriage ever took place or existed between the plaintiff and defendant. If there was no marriage, or none is shown by proofs, then, as a matter of course, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed. * * *

There is much controversy as to what constitutes a valid common-law marriage. It always has been and still is a doubtful question in England. Reg. v. Millis, 10 Clark & F. 534; 1 Bish. Mar. & Div. §§ 270, 278. In the American states where such marriages have been recognized and held valid there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland some ceremony or celebration seems to be necessary to a valid common-law marriage, and in most or all of these states it has been questioned whether or not the statutes have not superseded common-law marriages, and that a marriage, to be valid, must be in conformity with the statutes. State v. Samuel, 19 N. C. 177; Grisham v. State, 2 Yerg. 589; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Denison v. Denison, 35 Md. 361, 379.

The rule is fully as liberal, if not more so, in New York and Pennsylvania, than it is in any of the other states. In New York it has been held that no religious form or ceremony of any kind is essential to validity of the marriage. All that is requisite in that state is that the parties should be capable of contracting, and that they should actually contract to be man and wife; but such contract must be proved to the satisfaction of the court, and may be proved by the wife, when her testimony is corroborated and entitled to credit. Bissell v. Bissell, 55 Barb. 325; Van Tuyl v. Van Tuyl, 57 Barb. 235.

In Pennsylvania it has been decided that "marriage is, in law, a civil contract, not requiring any particular form of solemnization before officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties, or by witnesses present when it is made. Therefore, when the evidence of the contract was the declaration of the wife that, 'about 31 years since, she went to the house of A. S., to live with and keep house for him, under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together,' it was held that there was not proof of a marriage in fact." Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198.

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[28] Part of the opinion is omitted.

I have been unable to find any case in which the courts of Virginia or of this state have ever held that a common-law marriage was valid. This is certainly persuasive evidence that such marriages have never been regarded as valid in these states.

Referring to the facts in this case, it does not seem to me that they are sufficient to prove a marriage according to the liberal rule adopted in the states of New York and Pennsylvania. Before any pretense of a legal marriage, the parties had lived and cohabited together for over 12 years. It is a well-settled rule of law everywhere that a cohabitation, illicit in its origin, is presumed to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and must satisfactorily prove that it had been changed into that of actual matrimony by mutual consent. Foster v. Hawley, 8 Hun, 68; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, and 1 N. W. 98; Appeal of Reading F. Ins. & Trust Co., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448; Hantz v. Sealy, 6 Bin. (Pa.) 405.

In the case before us the testimony of the pretended wife is contradictory, and so unsatisfactory as to render it extremely improbable and unreliable. But, if we admit its credibility, it falls far short of establishing any actual contract of marriage. It simply proves the continuance of the illicit association and cohabitation which is shown to have existed between the parties, without interruption, for over 12 years before the alleged marriage. The plaintiff simply says that she and the defendant did not deem it necessary to marry again, as they considered their former illegal marriage legal, and that they thereafter lived together just as they had been doing, as man and wife. There is no semblance of a change in their relations or actual agreement of marriage shown here, and this is all the evidence we have of the alleged marriage.

But, in the view this court takes of the law, it is unnecessary to rest our decision upon the conclusion just indicated. We think our statute has wholly superseded the common law, and in effect, if not in express terms, renders invalid all attempted marriages contracted in this state which have not been solemnized in compliance with its provisions. The statute in force in this state in 1873, when it is alleged the marriage now in question occurred, is embraced in chapter 63, Code 1868. The first section of said chapter provides for the issuance of marriage licenses; the third, fourth, and fifth sections, by whom, and the manner in which, marriages may be solemnized; and the sixth section is as follows: "Every marriage in this state shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage; nor shall any marriage celebrated within this state between the seventeenth day of April, 1861, and the first day of January, 1866, be void by reason of the same having been solemnized without such license."

Statutes regulating marriages have generally and properly been construed as directory, and not mandatory. Since marriage is a natural right, and one that existed independent of statutes, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. Consequently, the doctrine has become established, as a general rule, that a marriage good at common law will be held valid, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity. This rule, however is not universal. 1 Bish. Mar. & Div. § 283. It seems to me, therefore, that when the terms of the statute are such that they cannot be made effective, to the extent of giving each and all of them some reasonable operation, without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that "every marriage in this state *shall* be under a license, and be solemnized in the manner herein provided." It is possible that these words, standing alone, should, under the general rule just stated, be interpreted as merely directory. But the statute does not stop here. It qualifies these words by provisions which would be wholly useless and unnecessary if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not *"be deemed or adjudged void"* because the person solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not *"be void"* because they were solemnized without a license.

These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriages had in this state, contrary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made. The introduction of the exemptions is necessary, exclusive of all other independent, extrinsic exceptions. The maxim is clear, "expressum facit cessare tacitum," —affirmative specification excludes implication. Potter's Dwar. St. 221; Cates v. Knight, 3 Term R. 442.

It is therefore my conclusion that no marriage, or attempted marriage, if it took place in this state, can be held valid here, unless it has been shown to have been solemnized according to our statutes. It is very certain, it seems to me, that no attempted or pretended marriage can be held valid when it affirmatively appears that it has not been so solemnized. There is no pretense that the pretended marriage sought to be established in this case was solemnized in any respect according to the requirement of the statute. I am therefore of the opinion that the plaintiff and defendant in this case never were legally married, and that the plaintiff is not entitled to the relief prayed in her bill. I have come to this conclusion with less regret because, by the express command of our statute, "the issue of marriage deemed null in law, or dissolved by a court, shall nevertheless be legitimate." Section 7, c. 78, Code, p. 485; Stones v. Keeling, 5 Call (Va.) 143; Rice v. Efford, 3 Hen. & M. (Va.) 228.

For the reasons stated, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed.

JOHNSON, GREEN, and WOODS, JJ., concurred.[29]

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[29] For other cases holding that statutes prescribing formalities are mandatory, see Milford v. Worcester, 7 Mass. 48 (1810); Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411 (1879); Bashaw v. State, 1 Yerg. (Tenn.) 177 (1829), and cf. Johnson v. Johnson, 1 Cold. (Tenn.) 626 (1860); Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392 (1905); Robinson v. Redd's Adm'r (Ky.) 43 S. W. 435 (1897); Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74 (1898); In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699 (1892); Offield v. Davis, 100 Va. 250, 40 S. E. 910 (1902); Johnson's Heirs v. Raphael, 117 La. 967, 42 South. 470 (1906).

In Offield v. Davis, supra, Cardwell, J., said: "That no case has ever come to this court, before the one we have under consideration, involving the question whether or not a common-law marriage is valid in this state, is strongly persuasive that our people, from the passage of our earliest statutes on the subject of marriage, have interpreted them as mandatory and as wholly superseding the common law on the subject. The conclusions reached in the decided cases and by law writers that statutes regulating marriages are to be construed as directory, only, proceed upon the idea that marriage is of divine origin, and not purely of statutory origin; that marriage is dependent upon mutual consent, not upon the celebration or form by which it is entered into; that it is anterior to all forms, and was already in existence when man first began to make laws, so that the primary intent of all these acts is to regulate marriages, not to confer the privilege, etc. None of these authorities, however, question the power of the legislature, by plain language or clear implication, to declare all marriages or pretended marriages

III. Annulment and Avoidance of Marriage

N. Y. CONSOL. LAWS 1909, c. 14: "Sec. 7. Voidable Marriages—A marriage is void from the time its nullity is declared [30] by a court of competent jurisdiction, if either party thereto:

"1. Is under age of legal consent, which is 18 years;

"2. Is incapable of consenting to a marriage for want of understanding;

"3. Is incapable of entering into the married state from physical cause;

"4. Consents to such marriage by reason of force, duress or fraud;

"5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time."

(A) Grounds for Annulment Based on Lack of Capacity [31]

(a) Nonage

BEGGS v. STATE.

(Supreme Court of Alabama, 1876. 55 Ala. 108.)

Brickell, C. J.[32] * * * 3. The indispensable evidence to support a prosecution for bigamy is that the defendant had "a former wife or husband living"; a subsisting, valid prior marriage, subjecting to its duties, and conferring its rights. If the first marriage

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not entered into in accordance with the requirements of the statute illegal and void."

See, also, section 1 of the proposed Uniform Marriage Law (reprinted at end of this chapter); Ill. Rev. St. (Hurd's) 1909, c. 89, § 4, and N. Y. Consol. Laws 1909, c. 14, §§ 11 and 25, expressly abolishing common-law marriages. And see article on "A Proposed Uniform Marriage Law" in 24 Harv. Law Rev. 548, by Ernst Freund.

[30] In several states, as in the above statute, the marriage is said to be "*void from the time its nullity is declared.*" See comment on this form of statute in 1 Bish. Mar., Div. and Sep. §§ 633–640.

[31] See an article entitled "The Law of Capacity in International Marriages," by J. H. Beale, Jr., in 15 Harv. Law Rev. 382, discussing capacity to marry primarily from the standpoint of conflict of laws.

[32] Only part of the opinion is given. The statement of facts is omitted. It is sufficient to know that defendant was indicted for bigamy. He asked the court in writing to charge:

"2. That if they believe, from the evidence, that the defendant was under seventeen years of age at the time of the first marriage, then they must find him not guilty."

The court refused and defendant excepted.

is void, the offense has not been committed. 3 Whart. Am. Cr. Law, § 2628; 3 Greenl. Ev. § 208. But, if it is merely voidable, contracted under disabilities or impediments, which render it capable of confirmation or avoidance as the party may elect, it is a marriage in fact, until avoided, and a second marriage while it remains a marriage in fact is criminal. 3 Whart. Am. Cr. Law, § 2628; 1 East, 466, § 2. By the common law, no persons were capable of binding themselves in marriage, until they had arrived at the age of consent, which in males was fixed at fourteen, and in females at twelve. Marriage before that age was voidable at the election of either party, on arriving at the age of consent, if either of the parties was under that age when the contract was made. 2 Kent, 43; Schouler's Dom. Rel. 32; 1 Bish. Mar. & Div. §§ 149, 150. The statute of this state is: "A male under the age of seventeen, and a female under the age of fourteen years, are incapable of contracting marriage." R. C. § 2333. The evidence tended to show that the defendant was under the age of seventeen when the first marriage was contracted. The charge requested was, that if the first marriage was contracted while the defendant was under seventeen, he was not guilty. The charge assumes, as matter of law, that the first marriage was void. It was refused by the Circuit Court; and whether the first marriage was void, or voidable, is the precise question we must determine.

The statute to which we have referred, fixing the age of consent requisite to a valid marriage, or a marriage binding on the parties, is part of a title of the Code devoted to "Domestic Relations," and of an article devoted especially to "Marriage." The first, second and fourth sections of the article are confined to incestuous marriages, which are in express terms prohibited. The third is the section fixing the age of consent, and is without words of prohibition. It is simply definitive of capacity to contract marriage. The fifth, sixth, seventh, eighth, ninth, tenth, and eleventh sections, relate to the solemnization of marriage, the mode of obtaining authority for, and the preservation of legal evidence of it. The twelfth, thirteenth, fourteenth and fifteenth impose penalties for a violation of the preceding sections, by those having authority to solemnize; and on the probate judge for issuing license to solemnize, or not keeping the proper record of license and solemnization, in violation of the duty imposed on him. There is no penalty imposed on persons not of the requisite age, for contracting marriage, or on any person for contracting marriage, in any other than the mode prescribed. A marriage without license from the probate judge, without solemnization by any person authorized by the statute to solemnize it—a marriage merely by the consent of the parties—followed by cohabitation, is valid. The parties stand to each other in the relation of husband and wife, having all the rights, and subject to all the duties, flowing from a marriage in strict conformity to the statute. Campbell v. Gullatt, 43 Ala. 57.

When the different parts of this article are compared, the intention of the legislature seems unmistakable. Incestuous marriages are prohibited—are void ab initio; no subsequent acts of the parties can affirm, or impart to them validity. Not only are they prohibited, but those entering into them incur severe penalties. R. C. § 3601. There is no prohibition of the union of parties not of the requisite age, and no penalty imposed on them for forming the union. The incestuous marriage contravenes the voice of nature, degrades the family, offends decency and morals, and is absolutely interdicted. A marriage within the age of consent may be indiscreet, may disturb the peace of families, and may subject youth and inexperience to the arts of the cunning and unscrupulous; but it is wanting in the vicious and corrupting properties of the incestuous connection. The change in the terms of the statute in reference to these marriages, and the very nature of the two, forbid an interpretation that would place them in the same condition. If it had been intended to declare void the marriage of a person not of the requisite age, the intention would have been expressed in terms equivalent to those employed when incestuous marriages are prohibited. Goodwin v. Thompson, 2 G. Greene (Iowa) 329; Koonce v. Wallace, 52 N. C. 194. The statute serves the purpose of its enactment, when construed as operating merely an enlargement of the age of consent, from that fixed by the common law—of twelve in females, and fourteen in males—to fourteen in females and seventeen in males. The marriage between persons not of the statutory age is, as was the marriage between persons not of the age of consent at common law, imperfect, becoming perfect only by affirmance when the requisite age is obtained. Until disaffirmance, it is a marriage in fact, and the second marriage of either party is bigamy.

The case of Shafher v. State, 20 Ohio, 1, is opposed to this view, and opposed, as we think, to the great weight of authority. The general rule prevailing in this country is, that marriages, valid at common law, although not in conformity to statutory regulations, are valid, unless the statutes are prohibitory, or in restraint of them. Campbell v. Gullatt, 43 Ala. 57; 2 Green. Ev. § 460; Parton v. Hervey, 1 Gray (Mass.) 119. It would be violative of this principle, and of the intent of the legislature, to construe the statute under consideration as absolutely avoiding the marriage of a person not of the requisite age. We may remark, that if, on arriving at the age of seventeen, the female being of the age of fourteen years—or, if she was not then of the age of fourteen years, when she reached that age—either party disaffirmed the first marriage, it was thereby avoided, and the second marriage, if subsequent to such disaffirmance, was not in violation of law. No question was raised in the court below as to the affirmance or disaffirmance of the first marriage, and it would not be proper to say more in reference to it.

The charge requested did not assert a correct principle, and was properly refused. For the error we have pointed out, let the judgment be reversed, and the cause remanded. The defendant must remain in custody, until discharged by due course of law.[33]

WOOD v. BAKER.

(Supreme Court of New York, 1904. 43 Misc. Rep. 310, 88 N. Y. Supp. 854.)

Action to annul a marriage. Application for judgment on default.

SPENCER, J. This action is brought by the father of an infant wife against the husband to annul a marriage.

The complaint alleges that the plaintiff is the father of Lizzie E. Baker; that she is an infant; was married to the defendant September 16, 1898, when she was but thirteen years and seven months old; that she has not, since she attained the age of sixteen years, lived or cohabited with the defendant; and prays judgment declaring the marriage void.

The wife is not a party to the action, and there is nothing in the summons or complaint suggestive that the action is brought in behalf of the wife, or instituted with her knowledge or consent.

On the hearing, the court expressed doubt as to whether a valid decree could be entered, and suggested that the plaintiff take an order amending the summons and complaint by bringing the wife in as a party defendant; but plaintiff has not acted upon the suggestion, and insists upon his right to judgment without amendment.

The question, therefore, arises, whether a father may maintain an action to have the marriage of his infant daughter annulled without making such daughter a party to the suit. The plaintiff's attorney, in support of his contention, cites the case of Becker v. Becker, 58 App. Div. 374, 69 N. Y. Supp. 75. This was an action brought by a father to annul the marriage of his minor son while under the age of legal consent, and, so far as the record discloses, the son was not a party, but the opinion contains no allusion to that subject.

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[33] Accord: Walls v. State, 32 Ark. 565 (1877); State v. Cone, 86 Wis. 498, 57 N. W. 50 (1893). In the following civil cases it was also held that, where one party was under the age of consent, the marriage was not void, but merely voidable: Koonce v. Wallace, 52 N. C. 194 (1859); Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568 (1890); Silveira v. Silveira, 34 Misc. Rep. 267, 69 N. Y. Supp. 634 (1901); Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883 (1906).

But see Hardy v. State, 37 Tex. Cr. R. 55, 38 S. W. 615 (1897), where it was held that, under a statute providing that males under 16 and females under 14 years shall not marry, there can be no common-law marriage with a girl of 10; the court also saying there could be no marriage under that age with a license.

In Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316 (1893), it was held that a provision establishing the age of consent to unlawful carnal knowledge did not affect the age at which a female may consent to marriage.

Where either party is under the age of 7, the marriage is a mere nullity at common law. 1 Bl. Com. 436; Swinburne, Spousals, 20, 21; 2 Burn. Ecc. Law, 434, a.

An infant's promise to marry should be distinguished from his actual marriage. His promise to marry is voidable, whether he is under or over the age of matrimonial consent. Holt v. Ward, 2 Strange, 937 (Trin. Term, 5 & 6 Geo. II); Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709 (1817); Hamilton v. Lomax, 26 Barb. (N. Y.) 615 (1858); 1 Bish. Mar., Div. and Sep. §§ 563–566.

I am also referred to the case of Stivers v. Wise, 18 App. Div. 316, 46 N. Y. Supp. 9, which was an action brought by a mother to procure the annulment of a marriage contracted by her son when under the age of legal consent. In the title, the plaintiff is described as the mother of the infant, but the infant is not otherwise mentioned as a party. The sole question before the court in that case had reference to alimony and furnishes no guide for our action here.

Plaintiff also cites Slocum v. Slocum, 37 Misc. Rep. 143, 74 N. Y. Supp. 447. This was an action by a mother to have the marriage of her infant son annulled, on the ground that he had not attained the age of legal consent. It appears from the opinion of the learned justice that the son was not made a party to the action, but the question was not considered. The defendant set up a counterclaim, alleging misconduct on the part of the son committed subsequent to the marriage in respect to his marital obligations. To this the plaintiff demurred, and the court very properly held that the counterclaim constituted no defense to the mother's right of action. I cannot, however, subscribe to the view there incidently expressed, that the mother's right of action may not be rendered nugatory by the election of the son to affirm the marriage.

The marriage contracts of infants are not dependent upon the consent of their parents to the marriage, and parents may not have them annulled upon the ground of their non-consent. It is only the infant wife who may maintain an action to annul her marriage on the ground that it took place without the consent of her father, mother, guardian or other person having legal charge of her person. Code Civ. Proc. § 1742. Neither an infant husband nor a parent or guardian may maintain such an action, and the reasons therefor are not difficult to discover.

The right of a parent to maintain an action for the annulment of the marriage of his infant son or daughter rests solely upon the authority conferred by sections 1744 and 1750 of the Code of Civil Procedure, and the grounds therefor are limited to the fact that one of the parties to the marriage had not attained the age of legal consent, or that the consent of one of the parties was obtained by force, duress or fraud. But has the parent a right to maintain such an action irrespective of the infant and without making such infant a party to the action? I think not. The parent's right to maintain such an action is clearly in behalf of the infant and is in no way dependent upon any right which a parent may possess to control or restrain the marriage. The marriage contracts of infants are not void, but only voidable at the election of one of the parties to the marriage. A parent or guardian is not such a party.

But the question here has been, I think, practically decided by the Appellate Division of the Fourth Department in the case of Fero v. Fero, 62 App. Div. 470, 70 N. Y. Supp. 472. That was an action by the plaintiff, under the provisions of section 1750, Code of Civil Procedure, to have a marriage between her infant son and the defendant annulled on the ground that the son's consent thereto was obtained by force, duress and fraud. The son was not made a party to the action, and the court decided, in a well-considered opinion, that his presence was necessary for a proper determination of the action.

If such be the rule under the provisions of that section, I can see no reason why it should not prevail in respect to an action such as this, brought by a parent under the provisions of section 1744. The court in the case last cited say: "All persons having an interest in the subject of the action should be joined as plaintiffs or defendants. The complaint alleges that Glen D. Fero consents to the bringing of the action, and he certainly is united in interest with either the plaintiff or the defendant. If he desires to have the marriage annulled, he is interested in obtaining the judgment demanded; but if, on the other hand, he is satisfied with his marital relations, his interest is adverse to that of the plaintiff. In either case the controversy ought not to be determined until he is brought into the action. The rule contended for by the plaintiff's counsel would permit a parent, guardian or 'any relative' of a party to invalidate a marriage without the consent or knowledge of either of the parties thereto, and, if it were to obtain, might prove subversive to social order, sound policy and good morals." I fully concur in the view thus forcibly expressed.

I conclude, therefore, that the plaintiff is not entitled to judgment for the relief demanded in the complaint, and deny his application therefor. Judgment accordingly.[34]

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[34] Accord: State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899).

On the right of the infant himself to disaffirm, see People v. Slack, 15 Mich. 193 (1867); Walls v. State, 32 Ark. 565 (1877); People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934 (1899).

In Eliot v. Eliot, 81 Wis. 295, 51 N. W. 81, 15 L. R. A. 259 (1892), it was held that an infant is not estopped to annul the marriage by reason of fraudulent representations as to age.

(b) INSANITY

TRUE v. RANNEY.

(Superior Court of Judicature of New Hampshire, 1850. 21 N. H. 52, 53 Am. Dec. 164.)

Petition for a decree of nullity of marriage, prosecuted by the next friend of the petitioner.

It appeared, from the evidence, that the petitioner resided in Plainfield, in this county, with her parents, was over twenty-one years of age, and had a small property in her own right. She met Ranney secretly one evening, and they went together into the state of Vermont, where the marriage was solemnized. She afterwards returned to her father's house, and this proceeding was thereupon instituted.

It also appeared, from the evidence, that she could not wash nor dress herself properly and decently; that she went to the district school until she was about twenty years old, but could not spell, and could hardly read at all, and could not add nor subtract figures, nor state the number of Sabbaths in the year, nor tell the time of day by a watch, and could be taught nothing of geography. She could not distinguish one piece of money from another, and had no idea of the value of property. She thought one of her father's cows was worth $200 or $300, and one of his horses was worth $300 or $400. She could not knit, nor sew nor take care of her clothes. She could not be taught to do household work of any kind, nor cooking. She said at one time that it would require five hours, and at another time, twelve hours, to get a boiled dinner, and that if she dined at twelve o'clock she must begin to get dinner at twelve. She could not set the table for dinner, but would put the breakfast cups and saucers upon the table. She could not distinguish colors, nor cotton from flannel, nor count beyond twenty, nor be trusted to go on errands. She played with children four or five years old, and with their toys. She asked whether apples did not grow upon elm trees. At school she spoke of matters to the master, which females of her age would not allude to.

GILCHRIST, C. J.[35] Allusion is made to a decree of "divorce or nullity" by this court in the Revised Statutes, c. 148, §§ 2, 12, and 13. No mode is prescribed either in the constitution, or the statutes, in which proceedings shall be instituted and carried on, for the purpose of procuring a decree of nullity of marriage; but that the court have the power to make such a decree, and to regulate the mode of procedure, we think is beyond doubt. 2 Kent, Comm. 76. There is a provision in section 7, ch. 148, that every libel shall be signed by the libellant, if of sound mind, and of the age of legal consent, otherwise by the parent, guardian, or next friend of such libellant.

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[35] Part of the case on a point of conflict of laws is omitted.

The consent of the parties is essential to the validity of all contracts; and as marriage is a contract, it is essential to its validity, that the parties should understand the nature of the agreement they are about to enter into. Londonderry v. Chester, 2 N. H. 278, 9 Am. Dec. 61; Clark v. Clark, 10 N. H. 382, 34 Am. Dec. 165; 1 Bl. Com. 433. In the case of Turner v. Meyers, 1 Hagg. Cons. R. 416, 417, Lord Stowell said, a defect of capacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta by the earlier commentators on the law, that the marriage of an insane person could not be invalidated on that account; founded on some notion that prevailed in the Dark Ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character.[36] In more modern times it has been considered in its proper light, as a civil contract, as well as a religious vow; and like all civil contracts will be invalidated by want of consent of capable persons. So in the case of Browning v. Reame, 2 Phill. R. 70, Sir J. Nicholl, after quoting Blackstone, said: "Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course invalidate a contract, and the most important contract of life, the very essence of which is consent. If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, of taking care of his or her own person, or property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by another contract." A marriage de facto, under circumstances of privacy, inferring fraud and circumvention, between a person of weak and deranged mind, and the daughter of his trustee, and solicitor, who had great influence over him, and by whom he was clearly considered and treated as of unsound mind, was pronounced null and void. Portsmouth v. Portsmouth, 1 Hagg. 355.

The evidence in the case satisfies us, as we think it cannot fail to satisfy any reasonable man, that the petitioner was so imbecile, that she was entirely unable to understand the nature and obligation of the contract into which it was proposed she should enter. There is every reason to believe, that no person so lamentably imbecile as this young woman appears to be, could have the remotest idea of the meaning of a contract, for the performance of any of the ordinary duties of life, and still less of a contract of marriage. * * * We are, therefore, of opinion, that there should be a decree of nullity of marriage.[37]

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[36] Even some American judges seem to have been of the opinion that the marriage of an insane person was valid at common law. See Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641 (1856), where McDonald, J., said: "Marriage contracts are, by the common law, excepted from the rules which govern ordinary contracts. By the common law, an idiot might contract marriage, and the marriage of an idiot or lunatic was considered valid." And see Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Dec. 705 (1856).

LEWIS v. LEWIS.

(Supreme Court of Minnesota, 1890. 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 305, 20 Am. St. Rep. 559.)

Appeal from district court, Hennepin county.

Vanderburgh, J. The statute in relation to divorces (Gen. St. c. 62, § 2) provides that "when either of the parties * * * for want of age or understanding is incapable of assenting thereto, * * * the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears that the parties freely cohabited together as husband and wife after such insane person was restored to a sound mind. Sec. 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was * * * insane, if such * * * insanity was known to the party capable of contracting at the time of such marriage." There are no other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce.

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[37] On the test of insanity for the purpose of annulling a marriage, see 1 Bish. Mar., Sep. & Div. §§ 591–601, and the following cases: Turner v. Meyers, 1 Hagg. Cons. 414 (1808); Foster v. Means, 1 Speers' Eq. (S. C.) 569, 42 Am. Dec. 332 (1844); Ward v. Dulaney, 23 Miss. 410 (1852); Durham v. Durham, 10 Prob. Div. 80 (1885); Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88 (1901).

The cases on insanity frequently use the terms "void" and "voidable" very loosely. See 1 Bish. Mar., Div. and Sep. §§ 614–632. And see the following cases: Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. 363 (1815), holding that marriage does not change the settlement of an insane person, and saying that marriage of an insane person is valid for no purpose whatever; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665 (1897), where suit was for divorce and court said marriage of an insane person could not be ratified by cohabitation after restoration to sanity; Chapline v. Stone, 77 Mo. App. 523 (1898), where marriage was annulled after nineteen years' continuous insanity, court holding plaintiff was not estopped by delay; Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130, 53 Atl. 1008 (1902), where court said marriage of insane person is void ab initio and can be impeached collaterally without judgment of nullity.

Compare the following: Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393 (1902), where in a suit for nullity it was held that the marriage was ratified by living together during lucid intervals; Price v. Price, 142 Ala. 631, 38 South. 802 (1905), where it was held that plaintiff was estopped to annul the marriage for insanity after delaying thirty-three years with notice of the insanity; Ducasse's Heirs v. Ducasse, 120 La. 731, 45 South. 565 (1908), holding that right to annul for insanity does not pass to heirs under Civ. Code, art. 110. See note in 40 L. R. A. 737–746, collecting cases.

On the influence of intoxication at the time of marriage, see 1 Bish. Mar., Div. and Sep. §§ 607–609, and Barber v. People, 203 Ill. 543, 68 N. E. 93 (1903).

The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage. The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses. Anon. 4 Pick. (Mass.) 32; St. George v. Biddeford, 76 Me. 593; Durham v. Durham, 10 Prob. Div. 80.

For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th Ed.) §§ 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. In re Blakely's Will, 48 Wis. 294, 4 N. W. Rep. 337; Jenkins v. Morris, 14 Ch. Div. 674; 11 Amer. & Eng. Enc. Law, 111, and cases.

2. The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices, used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not

subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. Reynolds v. Reynolds, 3 Allen (Mass.) 607, 608; Leavitt v. Leavitt, 13 Mich. 456; 1 Cooley, Bl. 439, and notes.

The facts found do not present a case warranting the relief asked. Judgment affirmed.

(c) PHYSICAL DISABILITY

The cases placed under this head are usually cases of fraudulent concealment. See cases later under head of "Fraud," p. 72 et seq. As to the power of a court to direct a surgical examination of defendant in an action to annul a marriage on the ground of physical disability, see Cahn v. Cahn, 21 Misc. Rep. 506, 48 N. Y. Supp. 173 (1897), and note in 11 Harv. Law Rev. 478.

In several states there are statutes prohibiting the marriage of epileptics under certain circumstances. A statute of this kind was held constitutional in Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531 (1905). The court, however, held the marriage not to be void, but only voidable, in case of fraudulent concealment. See note on the case in 19 Harv. Law Rev. 298. For definition of "physically incapable," under the New York statute, see Schroter v. Schroter, 56 Misc. Rep. 69, 106 N. Y. Supp. 22 (1907). See, also, Wendel v. Wendel, 30 App. Div. 447, 52 N. Y. Supp. 72 (1898), and B. (otherwise H.) v. B., 70 L. J. Prob. 4, [1901] Prob. 39.

In several states statutes declare marriages between whites and negroes, or whites and Indians, to be void. See Moore v. Moore, 98 S. W. 1027, 30 Ky. Law Rep. 383 (1907); Keen v. Keen, 184 Mo. 358, 83 S. W. 526 (1904); Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008 (1904); In re Walker's Estate, 5 Ariz. 70, 46 Pac. 67 (1896).

(d) RELATIONSHIP

ST. 25 HEN. VIII, c. 22, §§ 3 and 4: "And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother, or the stepmother, the brother the sister, the father his son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; (2) which marriages, albeit they be plainly prohibited and detested by the laws of God, yet nevertheless at sometimes they have been proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted or allowed; for no man of what estate, degree or condition soever he be, hath power to dispense with God's laws, as all the clergy of this realm in the said convocations, and the most part of all the famous universities of christendom, and we also do affirm and think.

"Be it therefore enacted by the authority aforesaid, that no person or persons, subjects or resiants of this realm, or in any your dominions, of what estate, dignity or degree soever they be, shall from henceforth marry within the said degree afore rehearsed, what pretence soever shall be made to the contrary thereof."

ACT OF ILLINOIS, FEBRUARY, 7, 1843 (Laws 1843, p. 155): "Sec. 1. All marriages hereafter contracted between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations."

ACT OF ILLINOIS, JUNE 15, 1887 (Laws 1887, p. 225): Amends section 1 of an act to revise the law in relation to marriages, of February 27, 1874, which re-enacts law of February 7, 1843 (see above), by inserting, after "aunts and nephews," the words, "and between cousins of the first degree."

N. Y. CONSOL. LAWS, c. 14, § 5: "A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: 1. An ancestor and descendant, or, 2. A brother and sister of either the whole or half blood. 3. An uncle and niece or an aunt and nephew."

BOWERS v. BOWERS.

(Court of Errors of South Carolina, 1858. 10 Rich. Eq. 551, 73 Am. Dec. 99.)

Edward Bowers died in the month of December in the year 1835, intestate. Shortly before his death a marriage ceremony was celebrated, in the town of Camden, between him and Elizabeth Jemima Graham, his niece, a brother's daughter.

In the bill filed in this case, by certain of his children, by a former marriage, for partition of a considerable estate left by him the ground was taken that this marriage between him and his niece was illegal and void, by reason of their too close relationship, and that the latter was entitled to no part of his estate.

The circuit decree is as follows:

DUNKIN, Ch. Upon hearing the bill, and answers, and the argument of counsel; it is ordered, on motion of J. B. Kershaw, defendants' solicitor, that the report of the Commissioner on the accounts of Anderson Bowers, administrator, the advancements to the children of the intestate, Edward Bowers, and the settlement upon Jemima Turner be confirmed with the recommendations of the Commissioner.

Also ordered, that the administrator do pay out of the corpus of the estate in his hands the costs of this suit, and that he do pay over to the defendant, Elizabeth Jemima Robertson, late Bowers, one-third of the balance of the estate in his hands as administrator.

Also ordered, that the said administrator do pay over to the parties entitled, reserving the share of Jemima Turner, the remaining two-thirds of the balance of the estate in his hands, after payment of costs, first deducting therefrom such reasonable counsel fee as he may have paid his counsel for his services in this case.

It is also ordered, that the Commissioner do proceed to collect the securities in his hands, given for the purchase of the real estate of Edward Bowers, deceased, when they shall have become due, and pay over the same, one-third to said Elizabeth Jemima Robertson, late Bowers, and the remaining two-thirds to the children of the said Edward Bowers, deceased, except the share of Jemima Turner, which he shall retain until the further order of the Court.

The opinion of the Court was delivered by

DUNKIN, Ch. It is not questioned that the circuit decree of the Court of Equity is in conformity with the unanimous judgment of the Law Court of Appeals in State v. Barefoot, 2 Rich. 209. Barefoot was indicted for bigamy, and the conviction was sustained upon the determination of the Court, that the marriage of the defendant, with his aunt, was valid, by the laws of South Carolina. The avowed object of the appeal is to obtain the review and reversal of that judgment.

Marriage in the State of South Carolina has always been regarded as a merely civil contract. For any civil disability it may be treated as void by any judicial tribunal of the State. But the Court of Equity has no more authority over the subject than a Court of Law, and any attempt to exercise any greater or more extensive authority would be a simple act of usurpation. In Mattison v. Mattison, 1 Strob. Eq. 387, 47 Am. Dec. 541, it was determined unanimously by the Court of Errors that in a suit between the parties to the marriage seeking to have the same declared void, the Court of Equity had no jurisdiction. But in a suit between third persons, arising in the Court of Law, the validity of the same marriage, impeached on account of an alleged civil disability, was fully examined, discussed and determined. The same power is familiarly exercised by the Court of Equity, as is illustrated by the case of Foster v. Means, Speer, Eq. 569, 42 Am. Dec. 332. All these inquiries relate, however, to some civil disability or other infirmity of that character in the alleged contract. But the incapacity in respect of proximity of relationship is a *canonical*, and *not* a *civil* disability. Neither the Court of Chancery in England, nor any of the Law Courts had cognizance of canonical disabilities. When Parliament thought proper to interfere, and, by the Stat. 5 and 6 Will. IV, c. 54, declared that all marriages, thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, should be absolutely void, then the objection came within the cognizance of the Courts of Common Law. 2 Steph. Com. 284. So when the Legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen, and enforced by the courts. But by this appeal the Court is invoked to recognize a principle which would not only declare void a marriage between uncle and niece, and of course bastardize their issue, but a marriage between a man and his wife's sister falls within the same category, and, if the canonical mode of computation of the Levitical degrees be adopted, a marriage between first cousins is equally prohibited. See note to 2 Steph. 284. On the other hand, extreme cases of unnatural alliances may be supposed at which the moral sense would be offended, but hitherto public sentiment, if not private morality, has repressed all such evils. It is far better to leave to the Legislature the appropriate duty of defining and prohibiting such evils rather than arm the Court of Chancery with ecclesiastical powers on a subject of great delicacy and pervading interest.

But the proposition of the appellants could not be successfully maintained in any Court of Great Britain, ecclesiastical, or civil. Marriages within the Levitical degrees are not void, but only voidable. And, even in Doctors' Commons, you are not permitted to violate the sanctity of the tomb, and impeach for alleged canonical disability the validity of a nuptial contract which death has already dissolved. "Not only" (says a learned commentator) "are marriages, under these circumstances of disability, esteemed valid, until there be actual sentence of separation, but they are permanently valid, unless such sentence be given during the life of the parties. (For, after the death of either of them, the Courts of Common Law will not suffer the spiritual courts to declare such marriages to have been void.)" 2 Steph. Com. 280. Bury's Case, 5 Rep. 98.

In the temporal Courts such marriages are held valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties. Shelf. Mar. and Div. 482. A marriage within the prohibited degrees, not avoided during the lifetime of both parties, confers the civil rights of marriage, such as the right of dower, right of administration, etc. Shelf. p. 179. And the author refers to Co. Litt. 33b, where it is said "that if a marriage be voidable in respect of consanguinity, affinity, etc., whereby the marriage might have been dissolved, yet if the husband die before any divorce, then for that it cannot now be avoided; this wife, de facto shall be endowed, for this is legitimum matrimonium quoad dotem."

So, in this case, it appeared that Edward Bowers, the husband, was dead, and the circuit decree properly adjudged to his widow, Elizabeth Jemima, one-third of his estate under the statute of distributions.

It is ordered and decreed that the appeal be dismissed. O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Appeal dismissed.[38]

HAYES v. ROLLINS.

COLBATH v. ROLLINS.

(Supreme Court of New Hampshire, 1894. 68 N. H. 191, 44 Atl. 176.)

Bills in Equity, to determine the rights of the parties in property in which Samuel E. Colbath claimed an interest as the surviving husband of Carrie J. Colbath. Facts found by the court. Samuel E. and Carrie J. were cousins. Both resided in this state at the time of their marriage here in 1889, and thereafter until her decease.

WALLACE, J. The statute in force at the time of the marriage in question prohibited the marriage of cousins (G. L. c. 180, §§ 1, 2), and provided that "every marriage contracted by parties within the degrees prohibited by the two preceding sections is incestuous and void, and the issue of such marriage illegitimate." G. L. c. 180, § 3. It also provided that "all marriages prohibited by law on account of the consanguinity or affinity of the parties, * * * if solemnized in this state, shall be absolutely void without any decree of divorce or other legal process." G. L. c. 182, § 1.

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[38] See 2 Poll. & Mait. Hist. of Eng. Law, 383–390, for historical discussion and method of computing degrees.

To the effect that relationship within the forbidden degrees renders the marriage voidable merely, and not void, see Harrison v. State, 22 Md. 468, 85 Am. Dec. 658 (1863), and Boylan v. Deinzer, 45 N. J. Eq. 485, 18 Atl. 119 (1889), with note collecting cases. To the effect that, where statute makes the marriage voidable on account of relationship, a court of equity will annul at the instance of either party, though the applicant may have knowingly and willfully entered into the same, see Martin v. Martin, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612 (1903). For nature of decree and penance imposed by the ecclesiastical court, see Blackmore and Thorpe v. Brider, 2 Phil. 359, at 362 (1816).

On the impediment of affinity, see 1 Bl. Comm. 435; Hill v. Good, Vaughan, 302; Harris v. Hicks, 2 Salk. 548 (Hil. T. 4 and 5 W. & M.); Aughtie v. Aughtie, 1 Phil. 201 (1810). Cf. Blodget v. Brinsmaid, 9 Vt. 27 (1837).

Under the common law, the canonical impediments of consanguinity and affinity only rendered a marriage voidable. Until set aside, it was practically valid. Some of the American courts, following this doctrine, have construed statutes declaring such marriages void as meaning voidable, when such construction was not expressly precluded by the terms of the statute. 1 Bish. Mar. & Div. §§ 105, 112, 320. But our statute, which expressly provides that marriages within the prohibited degrees shall be absolutely void without any decree of divorce or other legal process, renders this marriage void. It is impossible to put any other construction upon the statute without doing violence to the English language, and defeating the clearly expressed intention of the legislature. Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281. The marriage between these parties being absolutely void without any judicial process or decree, Samuel E. can take thereby no interest in the estate of Carrie J.

Case discharged. All concurred.[39]

(e) PRIOR SUBSISTING MARRIAGE

CHAMBERLAIN v. CHAMBERLAIN.

(Court of Chancery of New Jersey, 1905. 68 N. J. Eq. 414, 59 Atl. 813.)

Bill by Mary Chamberlain against Stroud H. Chamberlain. Heard on bill, answer, replication, and proofs. Decree advised for complainant.

STEVENSON, V. C. (orally).[40] This bill is filed under the twentieth section of our divorce act by Mary Chamberlain against Stroud H. Chamberlain, who she alleges is her husband, charging that he has abandoned her and neglected and refused to support her, and praying for the statutory relief afforded in such a case. The answer contains an attempt, as I recall it, to answer the charges of misconduct set forth in the bill of complaint, but sets up as a complete defense—and this is the only defense which is supported by proof so as to call for consideration—that the defendant is not the husband of the complainant, and therefore is not liable to the statutory action, and is not liable to discharge the common-law duty which a husband owes to the wife in respect of support.

The brief for the defendant, which is very voluminous and discusses a large number of cases, presents at the start the following as the history of the case: "William Tissell and Mary Walsh (Mary Walsh being now the complainant, Mary Chamberlain) were married March

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[39] See, also, McIlvain v. Scheibley, 109 Ky. 455, 59 S. W. 498 (1900); Stapleberg v. Stapleberg, 77 Conn. 31, 58 Atl. 233 (1904). But a statute declaring marriages void for relationship will not be construed as retroactive. Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. Supp. 260 (1906).

[40] Part of the opinion is omitted.

29, 1871. William Tissell left Mary Tissell and went to St. Louis, and thence to Oak Grove, Texas, March 12 or 15, 1877. About July, 1877, a letter was received by Mary Tissell from William Tissell. Mary Tissell, under the name of Mary Walsh, was married to Stroud H. Chamberlain April 4, 1880. Mary Chamberlain, under the name of Mary Tissell, filed a petition for divorce in this court, sworn to by her, May 8, 1880, and decree of divorce granted thereon June 30, 1881. From time of marriage to Stroud H. Chamberlain in 1880, both lived and cohabited together as man and wife until defendant left her, in March, 1903. There was no issue born of the marriage. Both complainant and defendant believed the first husband, William Tissell, was dead until after these proceedings (that is, the proceedings in this present suit) were instituted, when that he was alive was discovered by the defendant. William Tissell, the first husband, was, at the time of the filing of the bill and the hearing of this case, living at Oak Grove, Texas." * * *

We have, then, the case of a man and woman who undertook to enter into the marriage relation with each other on April 4, 1880, both parties believing in good faith that they were competent to enter into that relation—that each of them had the capacity to marry the other—while in fact one of the parties, the complainant, the woman, was under a disability on account of her having a husband then living. These two parties, entertaining such belief, were married by a clergyman in the city of Brooklyn, and thereupon began living together as man and wife, and continued to cohabit as man and wife, holding themselves out to the world as married, each recognizing the other as his or her lawful spouse, for a period of 23 years. The proofs, I think, indicate that, before the complainant undertook to marry the defendant, she went, with his knowledge, to counsel, and instructed him (the counsel) to institute a divorce suit against her former husband, William Tissell, whom she believed to be dead. Without waiting, however, to obtain the decree which was subsequently obtained, divorcing her from Tissell on the ground of desertion, she undertook to enter into the marriage relation with the defendant. Both parties appear to have had full knowledge of all the facts. * * *

After the decree of divorce had been obtained in June, 1881, the complainant and defendant were living together, and some question was raised among the women who were living in the same boarding house, or living near these parties, in regard to Mrs. Chamberlain's status. The complainant was then known, and had been known and always was known after her marriage in April, 1880, as Mrs. Chamberlain, and was regarded as the defendant's wife. * * *

I shall not deal in detail with this matter, because both of these parties most positively testified that they believed that their original marriage was absolutely valid, and that Tissell was then dead, and that they never believed otherwise until after this present suit was commenced.

When the decree of divorce was obtained in June, 1881, these two parties for the first time became capable of marrying each other. They thought, as they both swear, that they were capable of marriage at the time of the ceremony, April 4, 1880. That is proved to have been a mistaken belief, but when the decree of divorce was obtained in June, 1881, then they became for the first time capable of entering into the marriage relation with each other. They continued, after the complainant's disability had been removed, to live as man and wife until March, 1903, a period of nearly 22 years. During all that time they treated each other as husband and wife. The proof of continuous, unbroken matrimonial habit and repute is beyond doubt or question. * * *

The controverted question in this case is whether, under the circumstances that I have stated, the relation of husband and wife between these parties was created at any time after the disability of the complainant to contract marriage with the defendant had been removed by the decree of divorce in June, 1881. In my opinion, upon the facts stated, the relation of husband and wife between these parties did begin—was created—at the time when the decree of divorce rendered it possible for them to marry. I am also of opinion that, if this first conclusion is erroneous, the relation of husband and wife began to exist a short time after the decree of divorce was obtained, when the defendant assured the complainant that it was not necessary to have any further ceremonial marriage between them; assured her that she was his legal wife; gave her this assurance in the presence of witnesses; and thereupon, in reliance upon such representations and statements of the defendant, the complainant remained with him, cohabiting with him as his wife, from year to year. * * *

There are three principal classes of cases which have come up in the courts where a man and woman have undertaken to establish before the world the status of marriage by a formal ceremony, and have continuously thereafter cohabited and held themselves out to the world as man and wife, when, in fact, at the time of the ceremonial marriage, one of them had a wife or husband already living, but where such incapacity during the course of the cohabitation has been removed by the death of the former wife or husband, or a decree of divorce has been obtained, dissolving such former marriage. One class of these cases is illustrated in Campbell v. Campbell, L. R. 1 H. L. Sc. 182, commonly referred to as the "Breadalbane Case." In that case a man eloped with a married woman, and lived in adultery with her. Subsequently the woman's husband died, and this man and woman continued to cohabit as they had formerly done; holding themselves out to the world, as they began to do at the time when they first lived together in adultery, as husband and wife. The House of Lords found that, under the circumstances of that case, the true rule would establish the marriage between these people who were treating each other as husband and wife at the time when they first became capable of entering into such relation.[41] The doctrine of this case was rejected by our Court of Errors and Appeals in the case of Collins v. Voorhees, to which I shall next refer, and which belongs to the second class.

The case of Collins v. Voorhees, which I have before me, reported in the Court of Chancery under the name of Voorhees v. Voorhees' Executors, in 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404, and in the Court of Errors and Appeals in 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412, where the dissenting opinion of Mr. Justice Garrison appears, and on page 555, 47 N. J. Eq., page 1054, 22 Atl., where the opinion of the Court of Errors appears through Chief Justice Beasley, presented these facts: The man, Voorhees, obtained a fraudulent and void divorce in Connecticut from his wife, who resided in New Jersey. He knew that his suit and decree were a gross fraud on his wife, and on the court. He exhibited this decree of divorce to a woman in Massachusetts, and she, honestly believing that he was lawfully divorced, was publicly married to him in a church, and thereafter continuously for some years cohabited with him as his wife, and was held out as his wife, and bore to him two children. As a matter of fact, a few months after this marriage Voorhees' wife in New Jersey heard of the fraudulent divorce which had been obtained in Connecticut, and appeared in the cause and had the decree opened, had permission to file a cross-bill, and the result was that the original decree obtained by Voorhees was vacated as fraudulent, and a decree of absolute divorce was granted to the New Jersey wife. This decree, of course, rendered Voorhees capable of marrying his Massachusetts wife. Voorhees, however, for manifest reasons, did not inform the woman who was living with him as his wife, in innocence, supposing that her marriage was lawful, that the decree of divorce had been set aside. He did not propose to have another marriage ceremony. He concealed fraudulently from the woman with whom he was living the fact that he had been incapable of marrying her when he undertook to do so, and that by the decree of divorce he had been rendered capable of such marriage. He went on for years enjoying all the fruits of his marriage or attempted marriage with this Massachusetts woman. In reliance upon his representations that he was her husband, and innocent of any wrongful intent, this woman surrendered herself to him and gave him all the advantages of marriage with her, and, of course, debarred herself from marriage with any other man.

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[41] See, also, the following cases, in which the impediment was apparently known to both parties: Stein v. Stein, 66 Ill. App. 526 (1896), held marriage ceremony ratified by living together seven years after the impediment was removed; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631 (1901), continuance of relation with matrimonial intent constitutes marriage, though both were impeded at the beginning, distinguishing Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887); Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935 (1907), held married by living together twenty years after removal of impediment; Mick v. Mart (N. J. Eq.) 65 Atl. 851 (1907), held married after removal of impediment, where defendant asked plaintiff if she was his wife, and he replied, "Yes, you are before God," and they continued to live together; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568 (1902), held continued cohabitation after removal of impediment raises a presumption of marriage. In Edelstein v. Brown, 35 Tex. Civ. App. 625, 80 S. W. 1027 (1904), it was held that the facts showed no intention to change the character of the relation after removal of the impediment, and hence no marriage.

The decision of the Court of Errors and Appeals, affirming the decree below in this case, was that the relations of Voorhees with the Massachusetts woman were not matrimonial at the start, because, of course, they could not be; but the decision goes further, and holds that the relations between Voorhees and this woman, when by the decree of divorce he had been rendered capable of marrying her, continued to be meretricious; that the matrimonial habit and repute after the divorce had been obtained must be referred back to the origin of the relations between these people. The court seem, in the opinion, to treat the case as belonging to the same class as the Breadalbane Case, where the relations between the parties—the man and woman—at the start were known to both to be meretricious.

It has always seemed strange to me that, in the opinions of the learned judges in this court and in the Court of Errors in this Voorhees Case, no reference is made to the law of estoppel—the great doctrine which is so potent in our law for the redress and the prevention of fraud. The case goes altogether upon the actual intent of Voorhees. In the Breadalbane Case the intent of both parties at the time the relations were established between them was to live in adultery, while they covered up their criminal relations by presenting the appearance of man and wife before the world. In the Voorhees Case the intention of this innocent woman was to enter into the lawful state of marriage with Voorhees.[42] He committed a gross fraud on her in obtaining possession of her and causing her to sacrifice her life to him, but she was not to blame. It has always seemed strange to me that no one suggested that Voorhees was estopped to deny that he consented concurrently with this woman to enter into the marriage state, when he had in the most solemn manner represented to her that he in fact did enter into that state with her, and, in reliance upon that representation, she had acted so much to her injury, and that, in accordance with the familiar rule, such estoppel became operative when he became capable of doing what he had falsely pretended to do.

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[42] In the following cases, also, only one party knew of the impediment; the other being innocent: Flanagan v. Flanagan, 122 Mich. 386, 81 N. W. 258 (1899). Innocent party, on learning of the impediment and its removal, insisted on a new ceremony. The other party objected on the ground of scandal, etc. Held facts justified a finding that there was an agreement to take each other as husband and wife, which made a valid marriage. See, also, Barker v. Valentine, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578 (1900). In Re Schmidt, 42 Misc. Rep. 463, 87 N. Y. Supp. 428 (1904), the innocent wife knew nothing of the impediment until the death of her husband, thirteen years after removal of the impediment. Held a common-law marriage. See, also, In re Wells' Estate, 123 App. Div. 79, 108 N. Y. Supp. 164 (1908), and Geiger v. Ryan, 123 App. Div. 722, 108 N. Y. Supp. 13 (1908).

Cf. Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33 (1907), where defendant married in Georgia before his first wife's Massachusetts divorce became absolute. Held, subsequent cohabitation of defendant and second wife after decree became absolute would not cure defect under common law of Massachusetts. See, also, Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887), distinguished in Robinson v. Ruprecht, 191 Ill. 424, 31 N. E. 631 (1901).

I know of no reason why the doctrine of estoppel in pais should not be applied in dealing with the consent which is necessary—the concurrent consent of a man and woman capable of contracting that the marriage relation shall be established between them. A meeting of minds is necessary, generally speaking, in order to a valid contract, but oftentimes what courts enforce is not the thing which two parties have actually agreed upon; what they enforce is the obligation arising from the consent of one, and the estoppel against the other to deny a corresponding consent. Suppose a man takes a woman before a clergyman or a magistrate, and undertakes to go through a ceremonial marriage, and, instead of answering affirmatively the most important question in the ceremony, answers negatively by adding the word "not" just loud enough for two or three convenient witnesses to hear. To make the case plainer, suppose he adds between other responses statements to those witnesses to the effect that the whole proceeding is a sham. Suppose he then leads the woman to the church door, and abandons her there, and states that the whole proceeding has been a farce. We may concede that there is no marriage between them. We may concede that the case is similar to the one which has been dealt with in our courts quite frequently, where both parties have gone through an apparently valid marriage ceremony, but in jest, and without matrimonial intent. But suppose the man consummates this marriage—takes the woman to himself before the world as his wife. Can there be any question that he would be estopped to deny that he had consented? Suppose, to take another case, a man and woman enter into a written contract of marriage, and, by some obscure use of words, or by the use of ink which is not visible at the time the contract is signed, it is made to appear that the man had no intention whatever to enter into the marriage state with the woman. If she acts in good faith, and relies on his representation, and yields herself to him as his wife—gives up all her other opportunities of marriage—would he be allowed to prove his actual intent at a later time?

I do not think that I ought to hold that the Court of Errors and Appeals meant to exclude the operation of this great equitable doctrine of estoppel from all consideration in determining whether an effective concurrent consent has been given between a man and woman in order to establish the marriage state. It seems to me, if the case settles anything on this subject of estoppel, it establishes sub silentio that the particular facts in that case did not make out an estoppel against Voorhees.

The third class of cases of the kind to which I have referred embraces those where the disability on the part of one party exists, but is unknown to either,[43] and where both parties in good faith believe that no disability in fact exists, and therefore actually intend to enter into the marriage state. That is this case. In the opinion of Chief Justice Beasley in the Voorhees Case, it is distinctly admitted that in such a case as is now before this court a subsequent removal of the incapacity of one of the two parties marks the commencement of a valid marriage between them. He distinguishes such a case as this from the Breadalbane Case, and the distinction is perfectly plain. Referring to the opinion of Lord Westbury in the Breadalbane Case, the Chief Justice uses the following language (I read from page 558, 47 N. J. Eq., page 1055, 22 Atl.): "He [that is, Lord Westbury] does not pretend that he can find anything in its favor [that is, the doctrine which he lays down], and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery; their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations, for, when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial subsequent to the removal of such impediment is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence under similar circumstances must be sufficient to show an abandonment of such purpose and the commencement of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest."

It seems to me that the distinction which Chief Justice Beasley so sharply draws between the Breadalbane Case and this Chamberlain Case now before this court is perfectly plain. The strange thing to me, which, perhaps, may be due to my inability to analyze these cases correctly, is that the great Chief Justice should have supposed that the Breadalbane Case, and the Voorhees Case are in the same class. In the Breadalbane Case the original purpose of both parties was to live in adultery, covering up their adulterous connection by the false appearance of marriage. In the Voorhees Case the unfortunate woman had no criminal intent, but from the start intended to live in marriage relations with the man who pretended that he could marry her. As I said before, no one suggested that this man Voorhees might or ought to have been held estopped to deny his matrimonial intent at the first moment when the matrimonial intent on his part became possible. In my opinion, there is almost as wide a distinction between the Voorhees Case and the Breadalbane Case as there is between the Breadalbane Case and this Chamberlain Case.

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[43] In the following cases, also, neither party knew of the impediment, and it was held that continued cohabitation after removal of the obstacle made them legally husband and wife: Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245 (1898); Taylor v. Taylor, 63 App. Div. 231, 71 N. Y. Supp. 411 (1901); Schuchart v. Schuchart, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342 (1900); Manning v. Spurck, 199 Ill. 447, 65 N. E. 342 (1902); Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199 (1902); Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171 (1903).

I think that Chief Justice Beasley, speaking for the Court of Errors and Appeals, plainly admits that in a case like this, where the parties come together and in the most solemn manner accept each other as husband and wife, and concurrently intend to establish that relation, and manifest that concurrent intention in the usual solemn form before a clergyman or a magistrate, they do not intend to live in adultery, and if, in fact, by reason of an unknown impediment (an unknown incapacity on the part of one of them to contract the marriage which they have attempted to contract), they have begun in fact to live in adultery, then, upon a subsequent removal of the impediment, if they continue to cohabit as man and wife (continue to live in precisely the same way in which they began to live together), such subsequent continued cohabitation must be deemed matrimonial, in accordance with the original intent, and cannot be deemed illicit, in accordance with an intent which neither of them ever had.

The three classes of cases which I have described seem to me to be essentially distinct from each other. In the first class, of which the Breadalbane Case is the type, both parties know of the impediment. Both intend not to marry, but to live in adultery. Both intentionally make a false pretense of marriage before the world in order to conceal their meretricious relation.

In the third class, to which this case and the case of De Thoren v. Attorney General, L. R. 1 App. Cas. 686, cited by Mr. Justice Garrison in his dissenting opinion, belong, both parties are ignorant of the impediment; both intend in good faith to marry, and do not intend to commit adultery; both believe that they are in fact lawfully married; and both make an honest representation to the world to that effect.

In the second class, which is intermediate between the others, and to which the Voorhees Case belongs, one of the two parties is in the situation of both parties in the Breadalbane Case, and the other party is in the situation of both parties in this Chamberlain Case and the De Thoren Case.

In determining the effect on the status of the parties in each of these classes of cases which is produced by the removal of the impediment while the cohabitation apparently matrimonial continues, it seems to me that a rule laid down in one of the classes of cases may be plainly inapplicable to either of the others. The three situations seem to be widely variant, and to call for the application of radically different principles of morals and public policy. * * *

If I am right in the view which I have expressed in regard to the application of the great doctrine of estoppel in cases like this and in cases like the Voorhees Case, in establishing a lawful marriage, by preventing one of the parties from denying that he or she concurrently with the other consented to the establishment of the status of marriage between them, as I think I intimated earlier, there is another ground upon which the marriage between these parties may be rested. If the marriage should be established for this reason, then, as I said, it would date, not from the removal of the disability, but from the time when the defendant made the representations to the complainant that he was her husband and she was his wife, and that no further marriage ceremony was necessary between them, and the complainant acted on those representations. Even if we might suppose that these declarations are not evincive, beyond doubt, of the matrimonial intent on the part of the defendant—if there is any theory of the case upon which it might be held that the intent of the defendant in living with this woman in the apparent relation of marriage after the divorce had been obtained was not bona fide, and that his intent in maintaining those relations must be referred back to the actual state of things when the marriage ceremony was performed—I strongly incline to think that the defendant should be held estopped to deny the existence of the matrimonial intent which he manifested so distinctly when he persuaded this woman that no further marriage was necessary, and induced her to continue living with him as his wife. She acted upon the intent which he manifested to her, and it seems to me that sound law, sound morals, require that the defendant, whatever his actual intent might have been, must be held estopped to deny the intent which he exhibited and manifested beyond doubt by representations upon which the complainant acted for years.

This case can plainly be distinguished from the Voorhees Case on account of the positive representations and assurances which the defendant made directly to the complainant after her divorce had been obtained, and upon which she acted in continuing to cohabit with him as his wife. I am bound, whatever my private opinion may be, to apply the law of the Voorhees Case while that case stands not overruled nor even modified, but I am not bound to extend the law of that case to other cases presenting a substantially different state of facts. * * *

I have perhaps said too much about the doctrine of estoppel in its application to this case, because, apart from that doctrine, I think the decision of this present case may be rested firmly upon the proposition that the proofs show beyond the shadow of a doubt that from the date of the divorce in this case, which removed this woman's incapacity to marry, the man and woman lived together as husband and wife, believing that they were husband and wife, consenting that the status of marriage should exist between them, and believing that such marriage status did exist. This, in my judgment, makes a marriage, and it is immaterial whether there was a particular date when some ceremony was pronounced between them, or some form of words was employed. It is enough if they concurrently intend that the marriage status shall exist between them, and each knows that the other so intends. All the rest is a mere matter of proof. * * *

My conclusion is that the complainant is entitled to a decree which will make the defendant liable, under the statute, to provide for her support and maintenance. The abandonment and neglect and refusal to support are proved in this case beyond doubt, and the decision which I have rendered disposes of the only defense which is worthy of consideration. * * * [44]

(B) Grounds for Annulment Based on Lack of a Real Consent [45]

(a) FRAUD

MOSS v. MOSS (Otherwise ARCHER).

(High Court of Justice, 1897. Prob. Div. 263.)

The following written judgment was delivered by

Sir F. H. JEUNE, President.[46] In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her.

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[44] In addition to the cases cited in the main case and notes, see, also, for further cases and discussion, note to Clark v. Barney, 24 Okl. 455, 103 Pac. 598 (1909), in 8 Mich. Law Rev. 325; note to Geiger v. Ryan, 123 App. Div. 722, 108 N. Y. Supp. 13 (1908), in 8 Col. Law Rev. 503, and note to the principal case in 19 Harv. Law Rev. 471.

See Pettitt v. Pettitt, 105 App. Div. 312, 93 N. Y. Supp. 1001 (1905), and Turner v. Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. Rep. 643 (1905), for effect of statutes.

To the effect that, where the relation is meretricious in the beginning, it presumptively continues the same, see Pike v. Pike, 112 Ill. App. 243 (1904); Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190 (1908); Henry v. Taylor, 16 S. D. 424, 93 N. W. 641 (1903). Cf. Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (1907), to the effect that there is no presumption either way; the character of the relation being matter of proof alone.

[45] On the nature of consent, see Hyde v. Hyde and Woodmansee, L. R. 1 P. & D. 130 (1866); held marriage of a man and woman professing polygamy, in a country were polygamy is lawful, is not a marriage in England, although at the time of marriage both the man and woman are single and have capacity to marry. On the effect of secret mental reservations of one party, not known to the other, see Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821 (1902), and In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263 (1905).

[46] The statement of facts and argument of counsel are omitted. That part of the opinion relating to continental and American decisions is also omitted.

I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void.

On these facts, the argument before me was that there was fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in other countries, and especially in certain States of America on the point in question.

In the case of Swift v. Kelly, 3 Knapp, 257, at page 293, decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke, and Shadwell, V. C., being members of the Board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made."

It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow—Turner v. Meyers, 1 Hagg. Cons. 414—referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract. Miles v. Chilton, 1 Rob. 684, 694. Lord Hannen said: "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract. Sottomayer v. De Barros, 5 P. D. 94, 101. The late President, Sir Charles Butt, said, in the case of Andrews v. Ross, 14 P. D. 15, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law."

It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract. See Hunter v. Edney, 10 P. D. 93; Durham v. Durham, 10 P. D. 80. Again, if both parties to the contract knowingly and willfully marry without compliance with the law as to publication of banns, either can have the marriage declared null—Andrews v. Ross, 14 P. D. 15—a state of the law which drew from the late President the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract; but English Courts have not resorted to these expedients, and, while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognize characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.) renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (Fulwood's Case [1638] Cro. Car. 482, 488, 493) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in Rex v. Burton-on-Trent, 3 M. & S. 537, of a man assuming a name to conceal himself from the person to whom he is to be married. In Portsmouth v. Portsmouth, 1 Hagg. Ecc. 355, and Harrod v. Harrod (1854) 1 K. & J. 4, the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which (to use the phrase of Wood, V. C., in the latter case) he or she did not understand. Browning v. Reane (1812) 2 Phillim. 69, and Wilkinson v. Wilkinson (1845) 4 N. of C. 295, are other cases of the same kind.

In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in Reg. v. Millis (1844) 10 Cl. & F., 534, 785, of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is material. Lord Stowell has at least three times expressed this in the most emphatic language. In Wakefield v. Mackay, 1 Phillim. 134, note, 137, that learned judge said: "Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage;" in Ewing v. Wheatley, 2 Hagg. Cons. 175, 183: "It is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage;" and in Sullivan v. Sullivan, 2 Hagg. Cons. 238, at page 248: "The strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by others, he had riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced."

The only authorities which were, before me, referred to as in any degree inconsistent with these views are the case of Miss Turner's Marriage Act, and a dictum of the late President in Scott v. Sebright, 12 P. D. 21. Neither of these deals with such facts as are relied on in the present case, and they can be put forward at most as sanctioning a somewhat wider application of the doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of Miss Turner the marriage was annulled by Act of Parliament. It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in Templeton v. Tyree, L. R. 2 P. & M. 420, it was an Act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts, which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by the impossibility of placing the evidence of Miss Turner, as a party, before the Ecclesiastical Courts, 17 Hansard (2d Series) 787, 1134. But a stronger observation, I think, is that duress is distinctly alleged in the petition, 59 Lords' Journ. 308, and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In Scott v. Sebright, 12 P. D. 21, 23, the late President said: "The Courts of Law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the Court, which shewed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English Courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shewn that authority to the contrary could be found in the Canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the Canon law. I do not propose to enter into any detailed examination of the Canon law on this subject, and I am well aware that the question has been considered not to be free from doubt, but my own opinion is that the Canon Law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and goes far to declare that the only fraud which vitiates marriage is that which goes to the consent.

I will quote only one authority, but that a high one. Ayliffe in his Parergon, p. 361, says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void ipso jure; * * * for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. * * * I have just now observ'd that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void ab initio. Now there are four species of error, which are hereunto referr'd. The first is stiled error personæ, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person deceiving another. A second species is stiled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa; for by the canon law such an error is an impediment to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolish'd among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman marry'd a bondwoman, knowing her to be such, the Church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call error fortunæ; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousand pounds, and the condition is not made good. The last species is stiled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deem'd to be simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary." * * *

I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed. Petition dismissed.[47]

ALLEN'S APPEAL.

(Supreme Court of Pennsylvania, 1882. 99 Pa. 196, 44 Am. Rep. 101.)

Libel for divorce a vinculo matrimonii, by William Allen against Hannah Allen, formerly Hannah Duval. The libellant alleged that said Hannah was pregnant by another at the time of marriage, that he had never had sexual intercourse with her prior to his marriage, was unaware of her unchastity and that, about seven months after the marriage, a child, of which he was not the father, was born. The respondent denied fraud on her part, and averred that the libellant was the father of the child, and that she had not prior to her marriage had sexual intercourse with any man other than the libellant.

Verdict for the libellant, and judgment thereon. Respondent appealed.[48]

SHARSWOOD, C. J. By the first section of the Act of May 8th, 1854, Pamph. L. 644, it is provided that "it shall be lawful for the courts of common pleas of this Commonwealth to grant divorce where the alleged marriage was procured by fraud, force or coercion." By this language must of course be understood such fraud as would at common law render a marriage void. It is settled beyond all controversy, that fraud which would vitiate any other contract —even an executory contract to marry—will not have that effect when the marriage has actually been solemnized and consummated. "It is well understood," says Chancellor Kent, "that error and even disingenuous representation, in respect to the qualities of one of the contracting parties in his condition, rank, fortune, manners and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent's Comm. 77.[49] It assumes that the party in entering into so solemn a contract—involving the most important duties and responsibilities for life, and upon which his happiness so much depends—has made all proper inquiries or is willing to take the other party upon trust without inquiry. According to the form of the marriage service of the Church of England, each party takes the other "for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish till death them do part according to God's holy ordinance." The fraud must be in what has been sometimes termed the essentialia of the contract. False personation by one of another person would undoubtedly be such a case. As to any other it will be found difficult, after looking through all the authorities, to lay down any rule which can sharply define and distinguish what are and what are not essentials.

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[47] In Franke v. Franke (Cal.) 31 Pac. 571 (1892), it was held that pregnancy at time of marriage did not constitute physical incapacity under Civil Code, § 82.

See an article entitled "Nullity of Marriage," by Franklin G. Fessenden, in 13 Harv. Law Rev. 110, discussing the English and American cases on fraud as a ground for a decree of nullity.

[48] A brief statement of facts is substituted for that in the report and part of the opinion is omitted.

[49] The following also have been held to be no ground for nullifying the marriage: False statement as to previous marriage, Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892 (1900); false statement that defendant had no divorced spouse living, where plaintiff belonged to a church by whose tenets such a marriage was invalid, Boehs v. Hanger, 69 N. J. Eq. 10, 59 Atl. 904 (1905); error as to chastity of wife before marriage, Delpit v. Young, 51 La.

Every case must, to some extent, depend on its own circumstances. Thus it is well settled that want of chastity on the part of the woman—ante-nuptial incontinence—even though she may have expressly represented herself as virtuous—forms no ground for avoiding the contract. Mr. Bishop, who has studied the subject with great care and research, in his valuable treatise on Marriage and Divorce, § 179, considers, that on well-established principles, if the woman has even been a common prostitute, and has reformed her life, yet conceals her former misconduct, the marriage would still be good. The marriage contract is an express renunciation by her of all unlawful intercourse with others than her husband; and he makes a similar renunciation. According to the marriage service before referred to, they both solemnly promise, "forsaking all others," to keep themselves solely to each other. I consider this marriage service as good evidence of the ancient common law of England. This seems to be also the dictate of humanity and in conformity to the gospel which so strongly throughout inculcates the rule of mutual forgiveness. For otherwise, one of strong passions, led astray by them or seduced by the wicked arts of others, could have no hopes from reform. In such cases it is best for society that the past should be entirely buried in oblivion, and that the poor, erring creature should have the chance of a new life of respectability and honor. It is best that the other party should know, when the sin is afterward revealed to him, that it can do no good, but unmixed evil, to make it public by applying for a divorce. They must learn to submit to the inevitable. In this country—certainly in this state—adultery is a ground for divorce a vinculo matrimonii; so that if there should be a relapse after marriage, the marriage can be annulled. The only practical result, therefore, of declaring the marriage absolutely void, ab

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Ann. 923, 25 South. 547 (1899); false statement that defendant had not had an attack of epilepsy for eight years, Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25 (1907); false statement as to wealth, Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257 (1905). And see note to Lyon v. Lyon, supra, in 13 L. R. A. (N. S.) 996.

initio, for simple ante-nuptial incontinence—whether in one instance or many—would be to render innocent children illegitimate. And if ante-nuptial incontinence be a sufficient ground of nullity as against the woman, it is not easy to see why it should not be so likewise against the man, and the consequences of such a doctrine it is not difficult to predict.

Actual pregnancy at the time of the marriage presents an entirely different question. It introduces a different element. The marriage status of the parties is changed. The man is then necessarily put to the alternative of either publishing his wife's shame or submitting to have the child of a stranger, an alien to his blood, introduced, recognized and educated as his own legitimate offspring. If a man, indeed, marries a woman knowing her to be pregnant, even though he may believe that he is the father, he cannot set up the fraud, if afterwards discovered; for no man would do such a thing unless conscious of having had himself previous connection with her; and though she may have falsely assured him that the child was his, if he chooses to rely on that assurance he must bear it as a misfortune. In one very strong case, where, the parties being white, the child born after the marriage proved to be a mulatto, yet the woman simply concealed from the man the fact of having received a negro's embraces about the time she did his, the marriage was adjudged valid. Scroggins v. Scroggins, 14 N. C. 535. In support of these general views it will be sufficient to refer besides to Reynolds v. Reynolds, 3 Allen (Mass.) 605; Leavitt v. Leavitt, 13 Mich. 452; Hedden v. Hedden, 21 N. J. Eq. 61; Farr v. Farr, 9 D. C. 35; Foss v. Foss, 12 Allen (Mass.) 26; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Baker v. Baker, 13 Cal. 87; and our own case of Hoffman v. Hoffman, 6 Pa. 417. "There is no absolute rule," says Mr. Bishop (section 180), "that pregnancy will entitle him (the husband) on discovering the fact to have the marriage declared void. In some circumstances it will, in others it will not; depending on the extent and nature of the fraud in the particular instance, as appearing in the facts special to the individual case."

Applying these principles to the facts of this case, we think that under the evidence it was submitted to the jury with proper instructions. There was no sufficient evidence that the libellant had ever had sexual intercourse with the respondent before marriage. He positively denied it. The respondent indeed swore that it was his child. She admitted that she had said that it was the child of Samuel Williams, but that it was at Allen's request upon a promise that if she would, he would live with her. This again he utterly denied. It was a strange story, but the jury were the judges of the credibility of the witnesses. The child was born about seven months after the marriage, so that there could have been nothing in her appearance at that time to indicate her condition. It was certainly not necessary that she should have expressly denied her pregnancy before the marriage. No man would think of asking such a question of a woman he was about to make his wife. It would be regarded by her as an insult, if she was, as he then must have supposed, a virtuous woman. * * *

Decree affirmed and appeal dismissed at the costs of the appellant.[50]

STATES v. STATES.

(Court of Chancery of New Jersey, 1883. 37 N. J. Eq. 195.)

On bill for divorce.

BIRD, V. C. A divorce is asked for in this case, on the ground of fraud. Two and a half months after the marriage the defendant gave birth to a fully-developed child. The complainant declares that he is not the father of it. Taking this to be true, then what?

The complainant says that he "was induced by the enticements and allurements" of the defendant "to have sexual intercourse with her, and that afterwards (about two months) she represented to him that she was about two months advanced in pregnancy, and that her offspring would be his," and that a physician, whose name she gave, assured her that the period of gestation had been running about two months. He trusted in these representations.

Now, is he entitled to the aid of a court of conscience? Can a man, who has been guilty of one of the grossest acts of immorality, expect any court to undo the toils which envelop him because of such immorality? Would any court, after listening to his confession, be justified in dissolving his fetters? I think not. He transgressed, and this transgression blinded him; otherwise, too, he would have been free from importunities to marry, and from all false statements as to his liability.

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[50] Accord: Ritter v. Ritter, 5 Blackf. (Ind.) 81 (1839); Reynolds v. Reynolds, 3 Allen (Mass.) 605 (1862); Baker v. Baker, 13 Cal. 87 (1859); Caris v. Caris, 24 N. J. Eq. 516 (1873); Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770 (1887); Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364 (1893); Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679 (1898). But the husband may condone the fraud by living with the wife after knowing the facts. Lenoir v. Lenoir, 24 App. D. C. 160 (1904).

The following cases have held concealment of a loathsome venereal disease to be ground for annulling the marriage: Ryder v. Ryder, 66 Vt. 158, 28 Atl 1029, 44 Am. St. Rep. 833 (1892); Anonymous, 21 Misc. Rep. 765, 49 N. Y. Supp. 331 (1897); Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734 (1901); Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (1898); Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120 (1904), although defendant had practically recovered at the time the decree was applied for. In Vondal v. Vondal, 175 Mass. 383, 56 N. E. 586, 78 Am. St. Rep. 502 (1900), annulment was refused where the disease at the time was probably not contagious, although it might be transmitted to the offspring, the marriage having been followed by four months' cohabitation.

On the effect of consummation, or lack of it, in obtaining a decree of nullity, see Robertson v. Cole, 12 Tex. 356 (1854); Lyndon v. Lyndon, 69 Ill. 43 (1873). And see Bish. Mar., Div. and Sep. §§ 316, 331–364, 456–464. Cf. article in 13 Harv. Law Rev. 110, at pages 121, 122.

Then why should he have been deceived by her entreaties or representations? He knew of her dishonor; he knew as well that she would deceive. He had participated with her in crime; why, then, should he be surprised by her falsehoods? She advertised her infidelity as well as her unchastity.

But the avenue for full information was before him. The defendant herself opened the door. She told him she had consulted a physician. Why did not he do the same? An examination by an expert would have revealed the true condition of the fœtus.

The master reports neither for nor against the petitioner, but encourages the favorable action of the court because of the youth and good standing of the complainant. He was of the age of twenty years; certainly not too young to know that he both violated the law of his country and sinned against the honor and integrity of the family which he now holds up as a shield. Good standing is a tower of strength to the innocent; but the confessedly guilty are on the same level as any other wrong-doer.

There is no countenance in law for the prayer of the complainant. It is expressly repudiated in Carris v. Carris, 24 N. J. Eq. 516.

I shall advise that the bill be dismissed.[51]

TAIT v. TAIT.

(Superior Court of New York City, 1893. 3 Misc. Rep. 218, 23 N. Y. Supp. 597.)

Bill to have marriage contract declared null on the ground of fraud.

McAdam, J. The plaintiff had been carnally intimate with the defendant, who was then a widow. To induce him to marry her, she represented that she was pregnant by him, and that the birth of the child would bring upon the three shame and disgrace, whereupon, to avoid the humiliation, he married her, believing the representation to be true. The marriage was never consummated by cohabitation. The plaintiff now asks that the marriage contract be annulled on the ground of fraud. The defendant makes no defense. The most important contract of life is marriage, the essence of which is consent, and where this is obtained by fraud it goes to the root of the obligation and avoids it. The party guilty of the wrong cannot take advantage of it, while the other party, if he chooses, may waive his objection and make the marriage good. The fact of the marriage not having been consummated has, therefore, in many instances influenced the court in favor of setting it aside. Bish. Marr. & Div. (4th Ed.) § 214.

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[51] Accord: Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98 (1867); Franke v. Franke (Cal.) 31 Pac. 571 (1892); Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376 (1885); Foss v. Foss, 12 Allen (Mass.) 26 (1866); Hoffman v. Hoffman, 30 Pa. 417 (1858). Cf. Barden v. Barden, 14 N. C. 548 (1832), and Scott v. Shufeldt, 5 Paige Ch. (N. Y.) 43 (1835), where the child born was a mullatto and the parties to the suit were white, nullity being allowed. Also cf. Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761 (1908), where under facts similar to those in the principal case a divorce was allowed under Code, § 3175.

What ought to be done in this case? The plaintiff, by his immoral act, put himself in a position where he could not tell whether the defendant was or was not in the condition she described; in other words, he put himself, by his own act, into her power. The question presented came before the court in Hoffman v. Hoffman, 30 Pa. 417, where it was held that if a woman pretends to a man that she is pregnant by him, and she is not pregnant at all, but he marries her, believing her representation to be true, he cannot have the marriage set aside for this fraud. This case is conclusive against the present application. In Jackson v. Winne, 7 Wend. 47, 22 Am. Dec. 563, it was held that the circumstance of a party being under arrest as the putative father of a bastard child is not enough to avoid a marriage on the ground of fraud or duress, and in a somewhat similar decision (Scott v. Shufeldt, 5 Paige, 43) the fact that the child, when born, turned out to be black instead of white (the color of the parents), did not seem to have much weight in the determination of the legal proposition involved. See, also, Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Foss v. Foss, 12 Allen (Mass.) 26; Scroggins v. Scroggins, 14 N. C. 535; Barden v. Barden, 14 N. C. 548. The fraud practiced on the plaintiff was the outcome of his illicit relations with the defendant, and while his "marriage was a failure" from the time of its ceremonial, the result may be imputed to concubinal origin rather than to any imperfection in the institution itself.

For these reasons the court declines to grant the decree applied for. Motion denied.[52]

DI LORENZO v. DI LORENZO.

(Court of Appeals of New York, 1903. 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609.)

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Gregorio Di Lorenzo against Johanna Di Lorenzo. From a judgment of the Appellate Court (71 App. Div. 509, 75 N. Y. Supp. 878) reversing a judgment in favor of the plaintiff and granting a new trial, plaintiff appeals. Reversed.

This action was brought to have the marriage between the plaintiff and the defendant annulled upon the ground that the former's consent thereto was induced by the fraud of the latter. It is alleged in the complaint, in substance, that prior to the marriage of the parties, in the city of New York, in November, 1891, the defendant falsely represented to the plaintiff that in October, 1891, during a period of time when he was absent from the state, she had given birth to a male child, of which he was the father, whom she exhibited to him as such; that he, believing these representations, and, in order to legitimatize the child, was induced to marry the defendant; that without such representations he would not have made the marriage, that the defendant's representations were false, in that she had not given birth to any child, but had fraudulently procured one to produce to the plaintiff for the purpose of inducing him to consent to marry her; that, as a result of the stratagem, he did marry her; that there has been no issue of the marriage; that the falsity of these representations was discovered but a short time before the commencement of the action, and that since their discovery he has not cohabited with the defendant. In answer to the complaint, the defendant denied so much of its allegations as related to the fraudulent representations, and set up an earlier marriage with the plaintiff in 1890, which was consummated by cohabitation.

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[52] Accord: Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426 (1887); Richards v. Richards, 28 Pittsb. Leg. J. (N. S.) 16, 19 Pa. Co. Ct. Rep. 322 (1896).

After the joinder of issue, the defendant moved for a jury trial, and the trial court framed specific questions of fact, which were tried out before a jury, who rendered a verdict upon each. The first question was whether the parties had been earlier married by an Italian minister as alleged by the defendant. To this question the jury answered, "No." The second question was whether, in October, 1891, or prior thereto, the defendant, for the purpose of inducing the plaintiff to marry her, falsely and fraudulently represented to him that, during plaintiff's absence from the state, she had given birth to a male child, of which he was the father, and whether she then and there produced and exhibited said child to him. To this question the jury answered, "Yes." The third question was whether the plaintiff, relying upon such representations of the defendant, and believing the same to be true, married the defendant in November, 1891, at the city of New York. To this question the jury answered, "Yes." The fourth question was whether said defendant gave birth to said male child, or to any child, on or about October 5, 1891. To this question the jury answered, "No."

Upon the action coming on regularly to be heard at a Special Term, the court adopted these findings of the jury, and filed a decision embodying the facts established by the verdict, and, further, finding that at the time of the marriage the plaintiff was seised of real estate of the value of $65,000, as the defendant well knew; that there had not been any issue of the marriage; that at the time of the marriage the parties were, and ever since have been, residents of the state; that since the discovery of the defendant's fraud the plaintiff had not cohabited with her, and that the plaintiff was entitled to a judgment annulling his marriage with the defendant. The judgment entered upon the decision was appealed from by the defendant to the Appellate Division in the Second Department, where it was reversed, and a new trial was ordered. From the order of reversal the plaintiff has appealed to this court.

GRAY, J. The order of the Appellate Division reversed upon questions of law only, and the facts as found by the trial court, being undisturbed by the determination of the Appellate Division, must be taken to be true.

The theory of the decision by the Appellate Division, as I understand it, is that the fraud in this case was insufficient to warrant the court in annulling the marriage between the parties, and that the considerations of public policy which environ the marriage relation as a status so far take it out of the domain of ordinary contracts as to render this conclusion necessary. It was considered that the representations of the defendant "worked no wrong for which the law, as at present established," would afford any remedy, in the right to an annulment of the marriage. The prevailing opinion of the learned court is very elaborate and clear, and its conclusions are deliberately reached upon a careful consideration of the authorities. In my opinion, however, it errs in failing to give due effect to the statutory provision relating to the annulment of a marriage for fraud, and in not giving to the element of a free and true consent in a marriage contract that high importance which it has in contracts generally.

The question, therefore, is whether, upon facts establishing that the consent of the plaintiff to marry the defendant was obtained by a fraudulent representation and by a stratagem, causing him to believe that he was the father of the defendant's child, the fraud was of such a material nature as to warrant the court in decreeing the annulment of the marriage contract. The law of this state with respect to matrimonial actions is regulated by statute. The Revised Statutes early conferred upon the chancellor the jurisdiction to declare a marriage contract void and to annul the marriage (2 Rev. St. [1st Ed.] 142), and the Code of Civil Procedure, into which their provisions were carried, confers a general jurisdiction upon the courts of the state, which may be called into exercise for certain causes existing at the time of the marriage. One of those causes is stated to be when "the consent of one of the parties was obtained by force, duress, or fraud"; and the only limitation imposed, where the action is on the ground of fraud, is that it must appear that the parties have not, at any time before the commencement of the action, "voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud." Code Civ. Proc. § 1743, subd. 4; Id. § 1750. This language is broad, and warrants but the one reasonable construction that the fraud must be material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage.

The statutes of this state declare that marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties, capable in law of contracting, is essential. 2 Rev. St [1st Ed.] 138. It certainly does differ from ordinary common-law contracts by reason of its subject-matter and of the supervision which the state exercises over the marriage relation which the contract institutes. In such respects it is sui generis. While the marriage relation, in its legal aspect, has no peculiar sanctity as a social institution, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws in its conduct as in its dissolution. Judge Story said of it that it is "something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts." Story's Conflict of Laws, § 108, note.

While, then, it is true that marriage contracts are based upon considerations peculiar to themselves, and that public policy is concerned with the regulation of the family relation, nevertheless our law considers marriage in no other light than as a civil contract. Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670. The free and full consent which is of the essence of all ordinary contracts is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule.

In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person, and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact, the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement to the truth of which she had pledged herself. It was a gross fraud, and, upon reason, as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract.

The jurisdiction of a court of equity to annul a marriage for fraud in obtaining it was early asserted in this state by the court of chancery, at a time when the limited powers of courts of law were inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all cases where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted when the assent to it was the result of artifice or of gross fraud. See Ferlat v. Gojon, Hopk. Ch. 478; Burtis v. Burtis, Id. 557. If, as it was observed by Chancellor Sandford in Ferlat v. Gojon, supra, no instance of the exercise of this jurisdiction was to be found in England, it was because the ecclesiastical or spiritual courts had cognizance of matrimonial causes; but he said "the jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage."

In Scott v. Shufeldt, 5 Paige, Ch. 43, the action was to annul a marriage which the plaintiff had been induced to enter into in order to escape proceedings under the bastardy act, which the defendant had brought against him, upon her oath that he was the father of her child. He subsequently ascertained that the child was by a negro. Chancellor Walworth held that: "If the mother, at the time she charged him [the complainant] as the putative father, and induced him to marry her, under the supposition that the child might be his, knew that it was not his child, but that it was the child of a negro, she * * * intentionally defrauded the complainant in such a manner as to authorize the court to declare the marriage contract a nullity." The power that was deemed by the court of chancery to be inherent in the court in the exercise of its equitable jurisdiction in cases of fraud was soon thereafter expressly conferred upon the courts by the Legislature of the state.

In Blank v. Blank, 107 N. Y. 91, 13 N. E. 615, the action was to set aside a judgment annulling a marriage contract between the parties upon the ground that the plaintiff (the former wife) had been induced, by untrue statements as to the law, to refrain from defending the action. The fraud upon which the action to annul the marriage had been based consisted in the woman's representation that she was a widow, whereas she had been collusively divorced from a former husband, who was still living. In affirming the judgment in favor of the defendant, it was said by Judge Rapallo, in the opinion, that, "whether the marriage between the defendant and the plaintiff was legal or illegal as matter of law, the fraud by which she was charged with having induced the defendant to enter into the contract was sufficient to justify the court in setting it aside, and she does not in any manner attempt to deny that she was guilty of the fraud charged."

Our attention has been called to cases in the courts of this state and of other states which seem to hold a different doctrine upon the subject of the judicial annulment of a marriage contract. Whatever may be said in explanation or in differentiation, I think it is sufficient that we rely upon the plain provision of our statute and upon the application to the case of a contract of marriage of those salutary and fundamental rules which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. Such was the judgment of the trial court upon the facts in this case, and I think that the learned justices of the Appellate Division, who concurred in reversing that judgment, were in error in holding that the law of this state afforded no remedy to the plaintiff.

The order appealed from should be reversed, and the judgment entered upon the findings of the Special Term should be affirmed, with costs to the plaintiff in the Appellate Division and in this court.

PARKER, C. J., and BARTLETT, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.[58]

(b) DURESS OR MISTAKE

FORD (falsely called STIER) v. STIER.

(High Court of Justice. [1896] Prob. Div. 1.)

Petition of Ella Louise Ford for a declaration of the nullity of the marriage solemnized between her and the respondent William Douglas Somerset Keppel Stier. The case was tried by Gorell Barnes, J., without a jury. The respondent did not appear.

GORELL BARNES, J. This case is a very remarkable one. The petitioner claims a declaration of the nullity of the marriage solemnized between her and the respondent at St. Mary Abbot's Church, Kensington, on June 5, 1889, on the ground that, owing to the duress to which she was subjected by her mother and the respondent, she was not a free agent in going through the ceremony.

It appears that the respondent had never spoken of marriage to the petitioner, or professed affection for her. She had met him only a few times. She was a girl of seventeen, inexperienced, of a nervous temperament, and much under the influence of her mother, a woman of strong character. The respondent and the petitioner's brother started for South Africa on June 1. They missed the steamer and returned to London. On June 4 the respondent obtained a marriage license, stating in his affidavit that the petitioner's father had given his consent. The petitioner's father had never heard of the matter, and the respondent misstated his name in the affidavit.

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[58] Cf. Glean v. Glean, 70 App. Div. 576, 75 N. Y. Supp. 622 (1902), where it was held no ground for annulling the marriage that a husband concealed from his wife the fact that he had had several children by another woman previous to marriage; Shrady v. Logan, 17 Misc. Rep. 329, 40 N. Y. Supp. 1010 (1896), where it was held to be no ground for annulment for a woman to conceal the fact that she was the mother of a bastard child.

In Scott v. Sebright, 12 Prob. Div. 21 (1886), Budd, J., at page 23 et seq., used language indicating that a marriage may be avoided by the same kind of fraud as would avoid any other contract. But see Moss v. Moss, ante, p. 72.

According to the petitioner's statement, on June 5 her mother told her that they were going out for a drive. They drove to St. Mary Abbot's, and there she was induced to go through the ceremony which has led to this suit. She says that she thought it was a betrothal, and objected to going through even that ceremony with the respondent, as she did not know him, but was so much under her mother's influence that she did as she was told. She declares that she said in the respondent's presence that she did not wish to be betrothed to him, and that he said, "Do as your mother tells you." The clergyman who officiated has not been called, but her manner does not seem to have attracted attention. She says that after the service she threw away the ring, and went home, that she has never seen the respondent since, and that the only member of the family who then knew what had happened was her mother. Her mother is now dead.

The petitioner's brother left for South Africa with the respondent on the day of the marriage. He states that on his arrival the respondent told him of the marriage, that he quarrelled with the respondent in consequence, and that on his return he mentioned the matter to no one but his mother, who told him to say nothing about it. The petitioner's father never heard of the marriage till he received the respondent's letter in 1893. He then sent for his daughter, who had in the meantime married Mr. Ford. The solicitor's evidence shews that the statement which she then made was substantially the same as that which she has made in Court.

I have seen the petitioner in the witness-box and am satisfied that she has given her evidence in good faith. Her case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so." I find that this was so, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and in so doing was to such an extent under the influence of her mother and the respondent that she was not a free agent. I therefore pronounce a decree nisi of nullity, with costs against the respondent.[54]

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[54] See, also, the following, where it was held that duress was shown: Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (1905), reviewing the American and English cases, and holding that there is no ratification by subsequent

(c) Subject Notes

(1) Power of a Court of Equity to Annul in Absence of Statute

See, on this point, the following cases: Mattison v. Mattison, 1 Strob. Eq. (S. C.) 387, 47 Am. Dec. 541 (1847); Burtis v. Burtis, Hopk. Ch. (N. Y.) 557 (1825); Anonymous, 24 N. J. Eq. 19 (1873); Waymire v. Spencer, 22 Ohio St. 271 (1872); Lyndon v. Lyndon, 69 Ill. 43 (1873).

(2) Marriage in Jest

"Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest, got up in the exuberance of spirits to amuse the company and themselves. If this is so, there is no marriage." McClurg v. Terry, 21 N. J. Eq. 225 (1870). See, also, Reg. v. Millis, 10 Cl. & F. 534, at page 785 (1843), where Lord Campbell said: "Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists; for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord Stowell and the canonists; and they gave validity to marriages in masquerades, where the parties were entirely mistaken as to the persons with whom they were united, marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights." Cf. Lee v. State, 44 Tex. Cr. R. 354, 72 S. W. 1005, 61 L. R. A. 904 (1902), and Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4, 25 Ky. Law Rep. 463 (1903), where the marriage was a sham on the part of the man only.

(3) Annulment of Marriage after Death of One Party

On this point, see Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653 (1892); Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185 (1897).

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cohabitation where the duress is still operative; Marsh v. Whittington, 88 Miss. 400, 40 South. 326 (1906); Scott v. Sebright, 12 Prob. Div. 21 (1886).

And see the following, where no duress was shown: Cooper v. Crane, [1891] Prob. 369; Todd v. Todd, 149 Pa. 60, 24 Atl. 128, 17 L. R. A. 320 (1892); Merrell v. Moore, 47 Tex. Civ. App. 200, 104 S. W. 514 (1907); Meredith v. Meredith, 79 Mo. App. 636 (1899); Collins v. Ryan, 49 La. Ann. 1710, 22 South. 920, 43 L. R. A. 814 (1897).

Whether the use of criminal process for seduction, or civil proceedings based thereon, constitutes duress, see Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706 (1904); Ingle v. Ingle (N. J. Eq.) 38 Atl. 953 (1897); Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191 (1890); Smith v. Smith, 51 Mich. 607, 17 N. W. 76 (1883).

In Grand Lodge v. Smith, 89 Miss. 718, 42 South. 89, 119 Am. St. Rep. 719 (1906), it was held in a suit by the pretended widow that a marriage obtained by duress was absolutely void, where it had not been consummated. The prevailing view is that such a marriage is only voidable. See note on this case, discussing the authorities, in 7 Col. Law Rev. 128.

A PROPOSED UNIFORM MARRIAGE LAW[55]

An act relating to and regulating marriage and marriage licenses, and to promote uniformity between the states in reference thereto.

Section I. Be it enacted, etc., That marriage may be validly contracted in this state only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this state to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

2. In accordance with the customs, rules, and regulations of any religious society, denomination, or sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife.

Sec. II. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the ...... of the ...... in which one of the parties resides: Provided, that if both parties be non-residents of the state, such licenses may be obtained from the ...... of the ...... where the marriage ceremony is to be performed.

Sec. III. Application for a marriage license must be made at least five days before the license shall be issued: Provided, that in cases of emergency, or extraordinary circumstances, the judge of the court having probate jurisdiction may authorize the license to be issued at any time before the expiration of said five days.

Sec. IV. No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the proper ...... who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage, the date of same, the names, relationship, if any, age, nationality, color, residence, and occupation of the parties, the names of the parents, guardians, or curators of such as are under the age of legal majority, any prior marriage or marriages of the parties, or either of them, and the manner of the dissolution thereof; and if there be no legal objection thereto, such ...... shall issue a marriage license in the form hereinafter prescribed. Or, the parties intending marriage may, either separately or together, appear before any ...... magistrate or justice of the peace of the ...... (whether in this or any other state) wherein either of the contracting parties resides, or of the ...... where the marriage is to be performed, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the proper ...... who, if satisfied after an examination thereof, that the same is in proper legal form, and that no legal objection to the contemplated marriage exists, shall issue a license therefor.

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[55] Only the more important sections of the proposed act are here given. The proposed act is reproduced here, not to show what is the law of any one state, but to serve as a basis of class-room discussion and for the purpose of comparison with local statutes and local law. For history, purpose, and scope of the proposed law, see article in 24 Harv. Law Rev. 548, by Ernst Freund.

Sec. V. No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the marriageable age of consent as established by law, and the age of legal majority, to wit, between ...... years and ...... years, if a male, and between ...... years and ...... years, if a female, no license shall be issued without the consent of his or her parents, guardian, or curator, or of the parent having the actual care, custody, and control of such minor or minors, given before the ...... under oath, or certified under the hand of such parents, guardian or curator, as aforesaid, and properly verified by affidavit before a notary public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said ...... and entered by him on the marriage license docket before issuing said license: Provided, that if there be no guardian or curator of either or both of such minors, or if there be no competent person having the actual care, custody, and control of such minor or minors, then the judge of the ...... of the residence of the minor having probate jurisdiction may, after hearing, upon proper cause shown, make an order allowing the marriage of such minor or minors.

Sec. VI. Provides for filing of a petition by any one who thinks parties incompetent to marry.

Secs. VII, VIII, and IX provide for penalties, blank forms, and dockets.

Sec. X. The license shall authorize the marriage ceremony to be performed in any ...... of this state, excepting that, where both parties are non-residents of the state, the ceremony shall be performed only in the ...... in which the license is issued. The license shall be directed "to any person authorized by the law of this state to solemnize marriage," and shall authorize him to solemnize marriage between the parties therein named, at any time not more than one year from and after the date thereof. If the marriage is to be solemnized by the parties without the presence of an officiating person, as provided by paragraph two of section one of this act, the license shall be directed to the parties to the marriage. If either of the parties be not of the age of legal majority, then his or her age shall be stated, and the fact of the consent of his or her parents, guardian, or curator shall likewise be stated; and if either of said parties shall have been theretofore married, then the number of times he or she shall have been previously married, and the manner in which the prior marriage or marriages was or were dissolved, shall be stated. The officiating person shall satisfy himself that the parties presenting themselves to be married by him are the parties named in the license; and if he knows of any legal impediment to such marriage, he shall refuse to perform the ceremony. The issue of a license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between the parties illegal, and the license shall contain a statement to that effect.

Secs. XI and XII give the form of marriage licenses.

Sec. XIII. The license shall have appended to it three certificates, numbered to correspond with the license (one marked "original," one marked "duplicate," and one marked "triplicate"), which shall be in form substantially as follows: [The forms are omitted.]

Sec. XIV. The marriage certificates marked "original" and "duplicate," duly signed, shall be given by the officiating person to the persons married by him; and the certificate marked "triplicate" shall be returned by such officiating person, or, in the case of a marriage ceremony performed without an officiating person, then by the parties to the marriage contract, or either of them, to the ...... who issued the license, within thirty days after the date of said marriage.

Sec. XV. The said ...... upon receiving such triplicate certificate, shall immediately enter the same on the docket where the marriage license of said parties is recorded, and place such certificate on file.

Secs. XVI–XXI provide for penalties.

Sec. XXII. A copy of the record of the marriage license, and marriage certificate, certified under the hand of said ...... and the seal of the court, shall be received in all courts of this state as prima facie evidence of such marriage between the parties therein named.

Sec. XXIII. All marriages hereafter contracted in violation of any of the requirements of section I of this act shall be null and void (except as provided in sections XXIV and XXV of this act): Provided, that the parties to any such void marriage may, at any time, validate such marriage by complying with the requirements of this act, and the issue thereof, if any, shall thereupon become legitimate, as provided by section XXVIII of this act.

Sec. XXIV. No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Sec. XXV. No marriage hereafter contracted shall be void either by reason of the license having been issued without the consent of the parents, guardian, or curator of a minor, or by a ...... not having jurisdiction to issue the same, or by reason of any omission, informality, or irregularity of form in the application for the license or in the license itself, or by reason of the incompetency of the witnesses to such marriage, or because the marriage may have been solemnized in a ...... other than the ...... prescribed in section X of this act, or more than one year after the date of the license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. Where a marriage has been celebrated in one of the forms provided for in section I of this act, and the parties thereto have immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly thereafter for the period of one year, or until the death of either of them, it shall not be lawful to prove that a license has not been issued as required by this act.

Sec. XXVI. Omitted from revised draft.

Sec. XXVII. If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of section I of this act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death, or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.

Sec. XXVIII provides for legitimation of illegitimate children.

Sec. XXIX provides for annual statement to be made to a central state authority.

Sec. XXX. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. XXXI. Provides for fees.

Sec. XXXII. Repealing clause.

CHAPTER II

DIVORCE AND SEPARATION

SECTION 1.—DIVORCE OR JUDICIAL SEPARATION[1]

I. JURISDICTION

HURD'S ILLINOIS REV. ST. 1909, c. 40, § 2: "No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state."[2]

NEW YORK CODE OF CIVIL PROCEDURE, § 1756: "In either of the following cases, a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery: 1. Where both parties were residents of this state when the offense was committed. 2. Where the parties were married within this state. 3. Where the plaintiff was a resident of the state when the offense was committed, and is a resident thereof when the action is commenced. 4. Where the offense was committed within the state, and the injured party, when the action is commenced, is a resident of the state."

REVISED LAWS OF MASSACHUSETTS, c. 152, "Of Divorce": "Sec. 4. A divorce shall not, except as provided in the following section, be decreed if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another state or country, unless before such cause occurred the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.

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[1] For a discussion of existing statutes on divorce and proposed reforms, see an article entitled "Proposed Reforms in Marriage and Divorce Laws," by Amasa M. Eaton, in 4 Col. Law Rev. 243 (1904). For early history, see II Poll. and Mait. Hist. of Eng. Law (2d Ed.) 366, 392–396, and 1 Bl. Com. 440–442.

[2] For construction of this section, see Way v. Way, 64 Ill. 406 (1872).

"Sec. 5. If the libellant has lived in the commonwealth for five years last preceding the filing of the libel, or if the parties were inhabitants of this commonwealth at the time of their marriage and the libellant has lived in this commonwealth for three years last preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, unless it appears that the libellant has removed into this commonwealth for the purpose of obtaining a divorce."

BURTIS v. BURTIS.

(Court of Chancery of New York, 1825. Hopk. Ch. 557, 14 Am. Dec. 563.)

This bill was filed by a wife against her husband. It stated the marriage of the parties; that after the marriage the complainant found, that the defendant was totally impotent; and that he had been so, from his birth. After stating a clear case of corporal impotence, on the part of the husband, with details, which are here omitted, the bill prayed a discovery from the defendant, in answer to the allegations of the complainant, and that the marriage might be dissolved.

The defendant demurred to the bill, objecting, that the complainant is not entitled to any relief; that the defendant ought not to be compelled to make any discovery; and that the complainant as the wife of the defendant, can not sue, otherwise than by her next friend.

THE CHANCELLOR.[8] When New York became a province of England, it was for some years ruled by a governor or a governor and council; and during that period, the governor, either alone or in conjunction with the council, seems to have exercised all magistracy, executive, legislative and judicial. During that period, one of the governors, Lovelace, granted four divorces; of which, one was in 1670, and the other three in 1672. These are the only instances of divorce, which appear to have taken place in the colony, during the long period in which New York was a province of England. In 1683, the people were admitted to a participation of the legislative power; and from that time laws were enacted by the colonial legislature. The colony never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce, or authorizing divorce, in any case whatever, was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature;

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[8] Part of the opinion is omitted.

but all such applications were refused. The governor of the colony, with the consent of the council, had power to establish courts of justice; and all the courts of the colony derived their origin from this source of authority. But no court having cognizance of matrimonial causes or divorces, was ever established in the colony; no court of the colony exercised any such jurisdiction; and no law concerning divorce was ever enacted by the colonial legislature. The four divorces granted by Governor Lovelace must be regarded as extraordinary acts of power, by a chief magistrate who possessed very great and indefinite authority; they were the acts of one governor; they stand alone in the history and practice of the English colony; and they afford no proof of any law of the colony authorizing divorces. According to all the information which I can obtain from records or otherwise, it appears that no divorce took place in the colony of New York during more than one hundred years preceding the time when the colony became a state; and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace, in 1670 and 1672. Thus it appears that the law of England concerning divorces and matrimonial causes, was never adopted in the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony.

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During more than ten years after the colony became a state, there was no law authorizing a divorce, in any case whatever. On the thirtieth day of March, 1787, the legislature passed a statute, entitled an "act directing a mode of trial, and allowing of divorces in cases of adultery." The preamble of this law was expressed in the following terms: "Whereas the laws at present in being within this state, respecting adultery, are very defective, and applications have, in consequence, been made to the legislature, praying their interposition; and whereas it is thought more advisable for the legislature to make some general provision in such cases, than to afford relief to individuals, upon their partial representations, without a just and constitutional trial of the facts." This was the first law in this state, authorizing a divorce; and it was confined to the case of adultery. It continued to be the only law, until the ninth day of April, 1813, when the legislature made a new and extensive provision for divorces. By the statute then enacted, the wife may obtain a divorce from her husband, where he has been guilty of cruel and inhuman treatment towards her, or such conduct as renders it unsafe and improper that she should cohabit with him; or where he has abandoned her and neglects to provide for her. The provisions last mentioned, were by a statute of the tenth day of April, 1824, extended to husbands against their wives.

Such is the history of our own law concerning divorces; and its actual state is found in these statutes now in force. I cannot admit, that we have another code, on the same subject; and that the laws of England concerning divorces, are also, laws of this state. The English law concerning divorces and causes of divorce, as it exists now, and as it existed while this state was a colony, is chiefly, the ecclesiastical law, and not the common law of that country. It is administered by judges and courts, whose jurisdiction has never existed, either in the state or the colony of New York; and it was evidently regarded by our ancestors of the colony and the state, as no part of the common law, which they adopted.

Our statutes are clearly, original regulations, intended to authorize divorces in cases, in which no divorce could before be obtained. They define the causes for which divorces shall be granted; they give jurisdiction of those cases to this court; and they give no other jurisdiction. The specified cases are with some differences, causes of divorce by the laws of England; but these statutes are evidently, founded on the supposition, that the causes of divorce which they define, were not causes of divorce, by any pre-existing law in force in this state. To consider these statutes as an adoption of the English law of divorces, would be a violent perversion of the language and intention of the legislature. Such a construction of these laws, would in effect, declare, that statutes authorizing divorces, in certain cases particularly specified, also authorize divorces, in a multitude of other cases not specified. Had the legislature considered the English law of divorces, as the law of this state, they would probably have authorized some tribunal to administer that law; but they have conferred no such authority; and they have cautiously, limited and regulated the power of divorce, as an innovation upon the pre-existing law of the state. If the power to divorce for one cause, could imply a power to divorce for a different cause, the statute of 1787, authorizing divorces, for adultery, might have authorized divorces for cruel treatment or desertion; and the subsequent statutes, would have been unnecessary. But the legislature entertaining no such opinion, have advanced by successive steps, and have authorized divorces, not by adopting or recognizing any foreign law, but by their own acts of legislation. The causes of divorce and the jurisdiction of this court, are equally prescribed by these statutes; the jurisdiction is given in the defined cases; and these laws confer no jurisdiction or authority to divorce, in any other case. In every view of these acts of our legislature, they are substantive laws, authorizing divorces in the cases which they specify, and not authorizing divorce, in any other case, or for any other cause. * * *

The cause for which this court is now asked to dissolve a marriage, is corporal impotence, on the part of the husband. This fact is not a cause of divorce, by our statutes; and it is impossible to yield to this suit, without adopting the law of England or some other country, concerning divorces, as the law of this state. If a divorce can be granted for this cause, the whole catalogue of causes allowed by the laws of England, may be equally adopted; the acts of the legislature and the policy of the state, respecting divorces, would be superceded by the doctrines of a foreign code; and a power hitherto unknown in this state, would be exercised. The corporal impotence of the husband, is a cause of divorce in England, and by the laws of most countries; but is not a cause of divorce, by the laws of this state. This suit must therefore, be dismissed.

The suit was accordingly dismissed, but without costs.[4]

DITSON v. DITSON.

(Supreme Court of Rhode Island, 1856. 4 R. I. 87.)

Petition for divorce. The petitioner married George L. Ditson in the city of New York, in October, 1842. After the marriage Mr. and Mrs. Ditson lived in Europe and Cuba, and then returned to America. Defendant deserted the petitioner in Boston. Upon being thus deserted the petitioner came to live with her father at Little Compton, R. I. Ditson had been absent, at the time of the filing of the petition for more than three years, during all of which time petitioner had lived in Little Compton, with the exception of three months spent in Newport, R. I. It was admitted that Ditson had never been domiciled in R. I., or even, to the knowledge of any witness, been within the state. No personal notice of the application for divorce had been given him, and none attempted to be given, since his place of residence was wholly unknown to the petitioner. The petition was filed in the clerk's office of the Supreme Court for the County of Newport, on the 9th day of July, 1856; and the clerk certified that he had given six weeks notice of the application by publication.

The court being satisfied that the petitioner had shown cause for divorce, intimated a doubt concerning the jurisdiction of the court over the cause and desired counsel for the petitioner to present authorities to the court upon that point.[5]

AMES, C. J. * * * The question raised by the case at bar, and for the decision of which in the affirmative this court is said by the supreme court of Massachusetts in Lyon v. Lyon, 2 Gray, 367, to have pronounced a decree in favor of Mrs. Lyon void upon general principles of law, is, whether the bona fide domiciliation of the petitioning party in this state is sufficient to give this court jurisdiction to grant a divorce a vinculo, although the other party to the marriage to be dissolved has never been subject to our jurisdiction, never been personally served with notice of the petition within the state, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it out of the state? In other words, the question is, whether, as a matter of general law, a valid decree of divorce a vinculo can be passed in favor of a domiciled citizen of the state, upon mere constructive notice to the foreign or non-resident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked? * * *

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[4] See, also, to the effect that in the United States courts have jurisdiction to grant divorce only when such jurisdiction has been expressly conferred upon them by statute, Anonymous, 24 N. J. Eq. 19 (1873); Irwin v. Irwin, 3 Okl. 186, 41 Pac. 369 (1895); Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012 (1906); Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090 (1907).

See, also, note to Rumping v. Rumping, supra, in 12 L. R. A. (N. S.) 1197, on the "Necessity of Alleging Jurisdictional Residence in Divorce Proceedings."

[5] The above short statement of facts is substituted for that in the report. Only part of the opinion is given.

It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only parties to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it. The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy ut sit finis litium, and upon the necessity, to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpœna, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than that administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the first tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail, living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings in rem, or quasi in rem, known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence, in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding.

This, too, is founded upon a necessity of high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think, be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with personal notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances, is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected,—a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of the general law, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those within its jurisdiction and entitled to its aid only by dispensing with personal notice to those out of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of general law.

Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate them, and so the legal obligation of the relation which involves them, altogether.

This it may do, with the exception above stated, as to some relations, by law, when it wills; declaring that the legal relation, of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other; nor, is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation, in the status of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada—no treaty obliging his restoration—or who is brought by his master thence to a free state of the Union—no constitutional provision enforcing his return—finds his status before the law in the new jurisdiction he has entered, changed at once; and no one dreams that this result of a new domicil and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it.

Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other states or nations, under the general law which pervades all Christendom, can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens or subjects, it should pay all, and no more attention, than is practicable to the competing rights and interests of their citizens and subjects. It should give to nonresidents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands personal notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is very evident, upon examining the statutes of the different states of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it, to depend upon the place of the contract, some upon the place of the delictum, and some, as in this state, and as they should do, upon the domicil of the wronged and petitioning party. The courts of each state exercise, as they must, jurisdiction upon the principles laid down for them by statute; and have very little occasion, unless called upon to review the decree of some neighboring state, to attend to or consider any general principles pertaining to the subject. Engaged in this latter task, they are very apt to confound the statute principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grow out of the right of every state to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition, or status, as it is called, of all persons subject to its jurisdiction.

A singular instance of forgetfulness of this principle of "state sovereignty" is afforded by the case of Hull v. Hull, 2 Strob. Eq. (S. C.) 174, in which the right of the state of Connecticut to dissolve through its courts under the law of that state, a marriage there formed between two of its own citizens, upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the contract of marriage upon such notice was part of the law of the place of the contract and so part of the contract itself. The courts of that state, it seems, whilst forgetting the state rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of Lolley's Case, or rather of McArthy v. McArthy, that a South Carolina marriage cannot be dissolved out of the state of South Carolina, although any other may. In Irby v. Wilson, 21 N. C. 568, 576, under similar circumstances, except that in this case the wife was the deserting and the husband the petitioning party, the supreme court of North Carolina held that a Tennessee divorce was void, upon the ground hinted at in Lyon v. Lyon, supra, to wit, that such a proceeding being between parties, and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the status of one of its own citizens, become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation, its citizen, the wife, although her husband might have compelled her to flee from him to the only home open to her in that state, by the grossest violation of the duties which their relation to each other imposed; and thus, both these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania, the jurisdiction is made to depend upon jurisdiction over the offender at the time of the offence, (Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767) as if the lex loci delicti were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the state, when we suppose the delictum would be regarded as a breach of contract, if such by the law of Louisiana in which the contract was entered into. Edwards v. Green, 9 La. Ann. 317.

Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledge the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by statute, can administer, but ascertain whether it has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as quasi crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this, by an exception in favor of the tribunals of the place of contract; since there the delicta can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a tort, it may well be asked, why are they not at least personal in their nature, and transitory in their legal character? passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident that from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious, that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights, and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them are interested in that status, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether a mensa et thoro or a vinculo matrimonii, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions; the purposes of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court, every chance possible, under the circumstances, of appearing to the proceeding, and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the states of Connecticut and Tennessee called in question, as we have seen, by the courts of South and North Carolina, as probably by the practice of many other states, and certainly by the long continued practice of our own. They are sanctioned by the well-considered decision of Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549, and by that learned jurisconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com. 110, n. b., 4th Ed. They are otherwise best sustained by authority. Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Guembell v. Guembell, Wright (Ohio) 226; Cooper v. Cooper, 7 Ohio, 238, pt. 2; Mansfield v. McIntyre, 10 Ohio, 27; Harrison v. Harrison, 19 Ala. 499; Hare v. Hare, 10 Tex. 355. See also the whole subject discussed in Bishop on Marriage and Divorce, passim, and especially in chapter 34 of that valuable work.

It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject have been wisely provided against, by a clause of the constitution of the United States, and can find a remedy under it in the supreme court of the United States, as the court of last resort, in cases demanding its application. By article 4, § 1, of the constitution of the United States, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of the union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.

Although, as a general doctrine, the domicil of the husband is, by law, that of the wife; yet when he commits an offence, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own; and especially, if a native of the state to which she flies for refuge is, upon familiar principles, readily redintegrated in her old domicil. This is the well-settled doctrine of law upon the subject (Bishop on Marriage and Divorce, §§ 728–730, incl., and cases cited), and has by no court been more ably vindicated than by the supreme court of Massachusetts (Harteau v. Harteau, 14 Pick. [Mass.] 181, 185, 25 Am. Dec. 372).

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the court over her case, and to the question of her domicil in this state, can hardly be imagined, than the case at bar. The petitioner is the daughter of a native of this state, who, though formerly resident in Boston, has for many years past been domiciled in his native place.

Little Compton. Whilst at school, the petitioner became acquainted with an Englishman of the name of Ditson, and, in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again; he, however, giving every indication of a morose as well as inattentive husband. After a short time, he deserted her again in Boston, declaring, upon his leaving it for Europe that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, anything for her support, nor does she know where he is, except that he has gone to Europe. In the meantime, deserted as she was, she was obliged to return to her father's house in Little Compton; where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and neglect to provide for her, the proof, ex parte it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife.

We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this state, or even as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term; and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicil of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island,—her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now subsisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of Mary Ann Simmons, according to the prayer of her petition.[6]

II. GROUNDS FOR GRANTING DIVORCE

REV. LAWS MASS. 1902, c. 152: "Section 1. A divorce from the bond of matrimony may be decreed for adultery, impotency, utter desertion, continued for three consecutive years next prior to the filing of the libel, gross and confirmed habits of intoxication caused by the voluntary and excessive use of intoxicating liquor, opium or other drugs, cruel and abusive treatment or, on the libel of the wife, if the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.

"Sec. 2. A divorce may also be decreed if either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison or in a jail or house of correction; and, after a divorce for such cause, no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights."

HURD'S ILL. REV. ST. 1909, c. 40: "Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that in every case in which a marriage has been, or hereafter may be contracted and solemnized between any two persons, and it shall be adjudged, in the manner hereinafter provided, that either party at the time of such marriage was, and continues to be naturally impotent; or that he or she had a wife or husband living at the time of such marriage; or that either party has committed adultery subsequently to the marriage; or has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years; or has been guilty of habitual drunkenness for the space of two years; or has attempted the life of the other by poison or other means showing malice, or has been guilty of extreme and repeated cruelty; or has been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

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[6] The principal case has been generally followed in the United States upon both of the main points involved.

It has not been deemed expedient to cover in detail in this casebook points of conflict of laws, relating either to marriage or divorce. For a collection of cases on conflict of laws relative to divorce, the student is referred to Lorenzen's Cases on Conflict of Laws in the American Casebook Series at pages 536–565. The following cases, illustrative of this branch of the law, are there reported: Le Mesurier v. Le Mesurier, L. R. App. Cas. 517 (1895); Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903); Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901); Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906). Or see 1 Beale, Cases on Conflict of Laws, pp. 388–432. See, also, the following articles: "Constitutional Protection of Decrees for Divorce," by J. H. Beale, Jr., in 19 Harv. Law Rev. 586; "The Doctrine of Haddock v. Haddock," by Henry Schofield, in 1 Ill. Law Rev. 219; "Two Recent Cases on Interstate Marital Relations," by H. A. Bigelow, in 18 Green Bag, 348. And see notes on Haddock v. Haddock, supra, in 6 Col. Law Rev. 449, 40 Am. Law Rev. 580, 4 Mich. Law Rev. 534, and 22 Law Quar. Rev. 237. On the effect of a statute forbidding the remarriage of the guilty party, see notes in 22 Harv. Law Rev. 302, 24 L. R. A. 831, and 57 L. R. A. 169.

(A) *Adultery*

LEVY v. LEVY.

(Appellate Court of Illinois, First District, 1885. 16 Ill. App. 358.)

WILSON, P. J. This was a bill in chancery, brought by the appellant against the appellee for a divorce, on the ground of adultery. The defendant's default having been entered, the bill was taken pro confesso, and upon an ex parte hearing the bill was dismissed at the costs of the complainant for want of equity.

We have carefully considered the evidence tending to prove the commission by the defendant of the offense charged in the bill, since her marriage with the complainant, and without referring to it in detail, we need only say, that, though mainly circumstantial, it is, in our opinion, sufficient to establish the defendant's guilt.

It appears from the bill of exceptions that, previous to the marriage of the parties, the defendant, to the knowledge of the complainant, was a person of unchaste habits, and that the complainant himself had cohabited with her prior to the marriage, knowing her at the time to be a prostitute, but that he subsequently married her upon her promise to reform. Within a few days after the marriage he discovered that she was unfaithful to her marital obligations, and had committed adultery as charged in the bill.

The court below seems to have entertained the view that having knowingly married an immodest woman, though upon her promise of reformation, the husband cannot complain if she be guilty of adultery after the marriage. In this view we are unable to concur. The statute makes the commission of adultery by either party subsequent to the marriage cause for divorce. No exception or reservation is made in favor of or against any particular class of persons. It provides, "that in every case in which a marriage has been, or may hereafter be contracted and solemnized between any two persons, and it shall be adjudged that either party * * * has committed adultery subsequently to the marriage * * * it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract." The language is of general application, and is not to be limited or extended beyond what its terms plainly import. Two years' habitual drunkenness is also made a statutory cause for divorce, but we think it would hardly be contended that if a woman were to marry an habitual drunkard upon his promise to reform she would be thereby estopped from ever complaining, however much he might offend in that respect subsequently to the marriage. No difference in principle is perceived between such a case and the one in hand.

Aside from the promise of the defendant to reform, the vows at the marriage altar are themselves the most sacred promises that thenceforth, forsaking all others, the parties will lead chaste lives, and be faithful to their marital relations. However mistaken the complainant may have been in believing that, by conferring upon the defendant the honorable condition of wifehood, he would thereby restore her to a life of purity, he had a right to rely upon her promise to be true to him. To hold that when she thereafter was found sinning, the complainant is to be forever tied to a woman lost to every sense of decency and gratitude, and whom he had endeavored to clothe with the garment of respectability by making her his wife, is revolting to our sense of justice, and is not sanctioned by any sound rule of law. In Baylis v. Baylis, Law R. 1 Prob. & Div. 395, it is said: "Whatever the previous life of a woman may have been, she binds herself to chastity, and if she breaks the conditions of marriage, her husband is entitled to claim its dissolution." And in 1 Bishop on Mar. and Div. § 179: "In this country, where divorces a vinculo are granted for adultery, it is of little consequence whether the marriage of an unreformed prostitute, to a person whom she deceives as to her character, is to be deemed void from the beginning or not, since it would be annulled on proof of the subsequent adultery." The principle as thus enunciated we think salutary and just, and it is decisive of the present appeal.

The decree of the court below dismissing the bill will be reversed and the cause remanded, with instructions to enter a decree of divorce according to the prayer of the bill. Judgment accordingly.[7]

PRENDERGAST v. PRENDERGAST.

(Supreme Court of North Carolina, 1907. 146 N. C. 225, 59 S. E. 692.)

Action for divorce a vinculo, tried before Councill, J., and a jury, at September Term, 1907, of the Superior Court of Alamance County.

Plaintiff alleged and offered evidence tending to prove one act of illicit intercourse on the part of the husband, defendant. Without evidence ultra, the trial Judge thereupon intimated that he would charge the jury that in no aspect of the evidence was the plaintiff entitled to the relief prayed for, in that the laws of North Carolina did not allow a dissolution of the bonds of matrimony for one act of adultery on the part of the husband. Thereupon, plaintiff, having excepted, submitted to a nonsuit and appealed.

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[7] Accord: Baylis v. Baylis, L. R. 1 Prob. and Div. 395 (1867), semble; Roote v. Roote, 33 App. D. C. 398 (1909).

In a few states statutes make antenuptial unchastity resulting in pregnancy, or even antenuptial unchastity alone, a cause for divorce, where the prior prostitution of the wife was unknown to the husband at the time of marriage. See note to Franke v. Franke (Cal.) in 18 L. R. A. 375 (1892).

HOKE, J., after stating the case. Under Code 1883, § 1285, and for years prior thereto, the causes for absolute divorce in this State were as follows: (1) If either party shall separate from the other and live in adultery. (2) If the wife shall commit adultery. (3) If either party, at the time of the marriage, was and still is naturally impotent. (4) If the wife, at the time of the marriage, be pregnant and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage. By chapter 499, Laws of 1905, the first clause of the foregoing section was stricken out and there were substituted the words "If the husband shall commit fornication and adultery," making that part of the law, in effect, as follows: That an absolute divorce shall be granted, (a) if the husband shall commit fornication and adultery, and (b) if the wife shall commit adultery.

To adopt the position contended for by the plaintiff would require that these terms should have one and the same meaning, whereas the marked difference in the two clauses, standing as they do in such close juxtaposition, gives clear indication that the Legislature intended to make a distinction between the man and the woman in this feature of our laws of divorce, and we are of opinion that, in allowing a divorce when the man shall "commit fornication and adultery," it was intended to give those terms the distinctive meaning acquired by the words when associated together and as contained in section 3350 of the Revisal, defining the crime of "fornication and adultery." The uniform construction put upon this statute has established that, to constitute fornication and adultery, the misconduct must be habitual, and the General Assembly was no doubt advertent to this construction in making the amendment referred to.

There are grave reasons for the distinction made by this legislation,[8] which the General Assembly evidently regarded as controlling, but, being matters more properly for legislative consideration, they are not specified or dwelt upon here, and are only referred to in a general way in support of the construction we have given the statute. It is argued that this interpretation would leave the amendment without any force or effect on the law as it formerly stood, but a reference to the statute will readily indicate the change that was made and intended. Formerly, in order to obtain a divorce for such misconduct on the part of the husband, it was required that he should withdraw from his household and live in adultery, or force the wife to leave him, while this is now no longer required.

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[8] Brown, J., concurred in the result, but severely criticised the distinction made by the statute. He said in part: "One act of adultery on the part of either party to the marriage is ground for absolute divorce in every state of this Union except North Carolina, Kentucky and Texas (9 Am. and Eng. Enc. p. 746), and no injurious results have followed in those states which have repudiated the fallacy that public policy requires such a discrimination between husband and wife."

We think his Honor correctly interpreted the amendment, and there is no error in his decision.[9]

MATCHIN v. MATCHIN.

(Supreme Court of Pennsylvania, 1847. 6 Pa. 332, 47 Am. Dec. 466.)

This was an appeal by a wife, from a sentence of divorce a vinculo matrimonii, by the Common Pleas of Columbia county. The libel charged adultery, with the usual averments of time and circumstances.[10]

Gibson, C. J. Though we are bound to determine this appeal on the depositions sent up with the record, they contain enough to warrant a concurrence in the general belief that the appellant was actually insane; for no woman in her senses, however lost to shame, would apprize her husband's kinswoman, by whom her confidence was certain to be betrayed, of an assignation with a paramour. But a wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defence to a libel for adultery, though it would be a defence to an indictment for it. The offence is a social, as well as a moral one; and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititious offspring on the wife, than it is when committed by the wife, whose transgression may impose such an offspring on the husband; and hence it probably was—though the kindred fault of barrenness was also cause of divorce—that the right of repudiation was confined, in the primitive ages, to the husband; for there is no instance of an exercise of it by a wife till the time of Cicero, or shortly before it. Cooper's notes to Justinian, lib. 1, tit. 9, § 1, p. 435.

A libel for divorce is said to partake of the nature of a criminal proceeding; but the primary intent of it is undoubtedly to keep the sources of generation pure, and when they have been corrupted, the preventive remedy is to be applied without regard to the moral responsibility of the subject of it. It is true, that neither the canon law, nor our own statute, makes any distinction as to sex; but that the legislation of England, to which the dissolution of marriage in that country exclusively belongs, is guided by an opposite principle, is proved by its readiness to divorce for the adultery of the wife, and its reluctance to divorce for the adultery of the husband. There have been but two instances of the latter; and in each of them, the offence was marked with such circumstances of brutality, that a continuance of the nuptial relation would have reflected the disgrace of the husband on the wife. The distinction is said to be preserved in the laws of many other countries; and though it is not expressly preserved in the application of the remedy under our own, we are nevertheless at liberty to conclude that insanity might be a bar to divorce at the suit of the wife, when it would not, in similar circumstances, be a bar to divorce at the suit of the husband. To say the least, adultery committed under the irresistible impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently, erotic mania, would certainly be ground of divorce, though not of indictment.

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[9] In Stewart v. Stewart, 105 Md. 297, 66 Atl. 16 (1907), it was held that, where a statute authorizes divorces a mensa et thoro as well as a vinculo, but adultery is only made ground for divorce a vinculo, a divorce a mensa et thoro cannot be had on the ground of adultery.

[10] The statement of facts is abridged.

The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father; and the reciprocal taking for better, for worse, for richer, for poorer, in sickness and in health, to love and cherish till death, are important, but only modal conditions of the contract, and no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purposes of the marriage—the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world. The absurdity of the dogma, that marriage is a sacrament, and dissoluble only by the head of the church, instead of a political status subject to the power of the state, is manifest.

So far I have treated the subject as if the evidence made out a case of moral insanity, though, in point of legal effect, it does not. Does it prove the corpus delicti?

Were the wife's confession sufficient to prove it, the evidence of it would be ample; for she distinctly acknowledged it before the session of her church; indeed, she seems to have made only a show of persistence in denying it, and to have considered that she had done nothing very wrong. Considering her bringing up, which is admitted to have been of the most careful and exemplary kind, this dullness of the moral sense seems to have been a defect in the constitution of her mind. It is a rule of policy, however, not to found a sentence of divorce on confession alone. Yet, where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs. There is no doubt as to the nature of the rule, or difficulty in its application to the evidence before us. The facts resulting from it are, the wife's disclosure of the assignation to her husband's kinswoman; her absence at the indicated hour; her visit to a neighbour immediately preceding it; her abrupt termination of it, and feigned excuse for going; her presence at the appointed time and place in company with the man she was to meet; the shifting of their ground at the approach of an intruder; the disordered condition of her clothes when she came back; her declaration to her confidant the same evening, and confession to the church session next morning—these, together, make up the sum of plenary proof. To say nothing of the confession of her accomplice, which, not having been communicated to her, and confirmed by her, was not evidence to affect her, there was enough for the purpose of inculpation without the confession of either.

It is a fundamental rule, said Lord Stowell, in Loveden v. Loveden, 2 Haggard, 2, that it is not necessary to prove the direct fact of adultery; for, being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt. On this principle, a wife's visit with a man to a brothel, or to a man at his lodgings, has been held sufficient proof of it, because it is impossible to assign an innocent motive for such a meeting; nor can an innocent motive be assigned for meeting a man in the dark at a barn-door, in a secluded alley, with the stealthy and shrinking timidity of conscious impropriety. That the preconcerted design was partly put in act, is as convincing evidence of the consummation of it, as would be the testimony of an eye-witness to the fact. There was nothing but the will of the parties themselves to stop them.

We are of opinion, therefore, that the sentence is sustained by legal and sufficient proof. Sentence affirmed.[11]

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[11] In Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352 (1858), contra, Redfield, C. J., said: "We have read the case of Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466, and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground for divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and, as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic."

WRAY v. WRAY.

(Supreme Court of Alabama, 1851. 19 Ala. 522.)

This was a bill for divorce by Albert G. Wray against his wife, Susan M. Wray, on the ground of adultery. The defendant in her answer denies the adultery. She also states that in 1843 she was afflicted with mental derangement, and was totally unconscious, for a period of six months or more, of everything that transpired around her; that since that time she has had frequent attacks of the same malady, and has in fact enjoyed but few lucid intervals; and that while suffering under this derangement she is entirely unconscious, as in the first attack, of everything that transpires.

The chancellor held that the insanity was completely established by the evidence, and that it constituted a good defence. The bill was dismissed, and the complainant is now the plaintiff in error.

PARSONS, J.[12] * * * Taking, as we do, the insanity as established, the question of law arises, whether the complainant is entitled to a decree for a divorce notwithstanding. A really insane person is criminally liable for no act whatever. The law as stated by Lord Lyndhurst, in a homicide case which was before him, is, "that the jury must believe, before they can acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature." Rex v. Offord, 5 C. & P. 168. It is, however, true, as testified in this cause by one of the physicians of the lunatic asylum in South Carolina, that almost every insane person knows the difference, in the abstract, between right and wrong. In this respect they differ from idiots. But it does not follow that they are capable of acting on or of applying abstract principles to their own conduct. They may not be conscious of violating any law under the imagined circumstances or obligations of duty in which they are placed. They generally reason wrong by supposing facts or obligations of duty which have no real existence.

Had Mrs. Wray been indicted for the adultery, an acquittal would have been inevitable. But it must be conceded that an insane person is civilly liable for his trespasses. I do not doubt that. It is but just that the person whose misfortune has caused an injury to another should bear the loss; and, in the next place, the quo animo in such cases is immaterial. It was held in Massachusetts, that a husband was not entitled to a divorce on the ground that his wife had committed adultery when insane. [Broadstreet v. Broadstreet] 7 Mass. 474. But it was held in Pennsylvania, that the wife's insanity at the time of her adultery was no bar to the husband's libel for a divorce.

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[12] The statement of facts is slightly abridged. Part of the opinion is omitted.

[Matchin v. Matchin] 6 Pa. 332 [47 Am. Dec. 466]. I cannot assent to the latter opinion, although it was delivered by Chief Justice Gibson. It is very true, that a legitimate off-spring is one great object of marriage, and that if a sane woman act so as to disappoint her husband's object and expectations in this respect, he is entitled to a divorce. In such case she is responsible for her acts and must abide their consequences. If the reasoning of Mr. Chief Justice Gibson had stopped there, no one could object to it. But if we extend the principle upon which his opinion is chiefly founded to its necessary results, it will be found to be untenable, I think. It would entitle the husband to a divorce, if the wife should become unfruitful from disease, or if another man should gain access to her by force or fraud. In this case advantage was taken of her mental alienation, which can be the cause of no forfeiture of her rights, any more than if a similar advantage had been taken by means of a soporific or of actual force.

As insanity itself is no cause for a divorce, nothing which is a consequence of it can be. The chancellor's decree is affirmed.[13]

(B) Cruelty[14]

MATHEWSON v. MATHEWSON.

(Supreme Court of Vermont, 1908. 81 Vt. 173, 69 Atl. 646, 18 L. R. A. [N. S.] 300.)

Petition for divorce, on the grounds of intolerable severity and refusal to support. Trial at the June Term, 1907, Caledonia County, Miles, J., presiding. Divorce granted for intolerable severity, with an allowance of $1,150 alimony. The petitionee excepted. The opinion states the case.

ROWELL, C. J.[15] A divorce from the bond of matrimony was decreed in this case for "intolerable severity." The treatment found is, in substance, not any personal violence, but that the libellee repeatedly accused his wife of adultery with two certain men, which accusations were sometimes made when he and his wife were alone, sometimes when others were present, especially their adopted son, who was sixteen or seventeen years old, and sometimes to others when his wife was not present, and that he had used harsh and abusive language to her, and called her vile names. It is found that there was no probable nor reasonable cause for the libellee to believe that his wife was guilty of adultery with either of those men, nor even of improper conduct with one of them, and that his accusations were groundless and false, and occasioned her "much mental suffering"; but that the libellee believed that improper relations existed between his wife and one of those men, and still believed so, but that this belief rested on no other foundation than his jealousy, arising, perhaps, from a certain transaction she had with that man, which, however imprudent on her part, did not justify the libellee's accusation of adultery with him. As to the other man, the court was unable to find that the libellee believed the accusation after he investigated the matter, which he did soon after the time when he claimed the adultery was committed. As to whether the "mental suffering" of the libellant injured her health, or might reasonably be expected to injure it, there is no finding.

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[13] Accord: Broadstreet v. Broadstreet, 7 Mass. 474 (1811); Mims v. Mims, 33 Ala. 98 (1858); Kretz v. Kretz, 73 N. J. Eq. 246, 67 Atl. 378 (1907). Nor is cruelty, while insane, ground for divorce. McEwen v. McEwen, 10 N. J. Eq. 286 (1854). On desertion, while insane, see Douglass v. Douglass, post, p. 134, and Storrs v. Storrs, post, p. 136.

[14] The student should note the various expressions used in the statutes; e. g., "cruelty," "extreme cruelty," "extreme and repeated cruelty," "cruel and inhuman treatment, whether practiced by using personal violence or other means," "intolerable severity," etc.

[15] Part of the opinion is omitted.

The principal question is, whether the facts found make a case of "intolerable severity" within the meaning of those words as used in the statute. The libellee's counsel contend that by the great weight of authority, both English and American, a false charge of adultery, made without reasonable or probable cause, unaccompanied by any act of personal violence, or any apprehension of such act, and unaccompanied by such injury to the feelings as to affect health, or to create a reasonable apprehension that it may affect health, does not constitute legal cruelty. The libellant's counsel say that the words, "intolerable severity," are not found in the divorce laws of any other state; that the language most commonly used is, "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like; that both courts and elementary writers seem to have found difficulty in giving a satisfactory definition of any of these expressions, and that they are found so coupled with other expressions, held by courts to limit or to extend their meaning, that perhaps no general definition can be given; that some of the earlier decisions held that "extreme cruelty" meant personal violence; but that in more recent years that definition has been discarded as too narrow and limited, and that it is now held that "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like, may be established by any line of misconduct persisted in by the offending party to such an extent as to cause injury to the life, limb, or health of the other, or to threaten, or to create a danger of such injury; and that it is not regarded as necessary that such injury, present or threatened, should be the direct result of such misconduct, but that it is enough if produced by grief, worry, or mental anguish, occasioned by such misconduct.

We regard this as a substantially correct statement of the law of this subject as at present generally held, both in this country and in England. It accords with Mr. Bishop, when he says that as late as when he wrote the first edition of his "Marriage and Divorce," it seemed to be the prevailing judicial opinion that mental suffering had nothing to do with bodily ills; at least, that it did not so directly create those ills as to render the infliction of such suffering legal cruelty; but that now, under more enlightened physiological views, the legal doctrine has become settled everywhere, he thinks, that conduct that produces pain of mind is cruelty whenever, operating alone or in combination with something else, it creates a danger to the physical health. 1 Bish. Mar. Div. & Sep. § 1563. And in section 1565 he says that this doctrine, having been affirmed in this country, has become fully established in England, as shown by Kelley v. Kelley, L. R. 2 P. & D. 31, and on appeal, *59.

But the libellant's counsel are not satisfied with the law as they say it is, because it is too narrow for a just and righteous administration of it in cases like this, in which, they say, the wife should not be compelled to wait till her mental suffering has produced or threatened bodily harm; and therefore they urge the Court, as it is not hampered by precedents of its own, to take a position more consistent with the interests of humanity, to the attainment of which, they say, the courts of some of the other states have blazed the way. But in undertaking to follow the way said to be thus blazed, the same difficulty would be encountered that the counsel say attends the giving of a satisfactory definition of legal cruelty, and for the same reason, namely, the difference in the phraseology of statutes, held by the courts to limit or to extend their meaning. Mr. Bishop says on this subject that the statutes of a few of the states are in terms to invite a modification of the English rule, and cites the Civil Code of California (§ 94) as it was in 1885, which defined "extreme cruelty" as "the infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." He goes on to say that some of those statutes permit divorce for excesses, cruel treatment, and outrages of a nature to render the living together of the parties insupportable, or employ other words of similar meaning; and that under them, mental suffering, without danger to the physical security, will suffice; or, on the other hand, that the statutes will be satisfied by blows alone. And he cites cases in Louisiana, Texas, Missouri, and Oregon, as coming under these "exceptional statutes" as he calls them. * * *

Mr. Bishop suggests what he calls a fair and just way of judicial escape from what he thinks are some of the absurdities of the books, without violating the doctrine of stare decisis, as that doctrine applies only to law, not to fact. He says that mental anguish, when deep and protracted, may well be deemed as dangerous to physical security as blows, and to occupy the same ground in the evidence of cruelty, and although this is a question of fact, that the court may as well take judicial notice of it as of the effect of blows. But he goes on to say, what makes against the idea of judicial notice, that if, in a particular case, it is the opinion of the court or the jury determining the fact, that the wife's health is in danger from ill conduct of the husband addressed primarily to the mind, she should have a divorce. 1 Bish. Mar., Div. & Sep. § 1552.

In referring to Bailey v. Bailey, 97 Mass. 373, 381, he says that if what is there said was in the minds of all judges and juries when considering cases of that sort, it would lead us to be reconciled to the rule of law that prevents the infliction of mere mental suffering from constituting ground for divorce. In that case it is said that if it be supposed that the interpretation of the statute there given does not sufficiently provide for a class of cases where, though the abusive language or conduct of one party does not affect the health of the other, yet makes the life of the other so wretched and intolerable that a divorce ought to be granted on account of the cruelty, the answer is that such supposed case cannot actually exist, for deeply wounded sensibility and wretchedness of mind can hardly fail to affect the health. 1 Bish. Mar., Div. & Sep. § 1566.

But this is not the position of the cases generally, and we are not prepared to adopt it. It is but recently, as we have seen, that the courts have come to think that mental suffering has anything to do with bodily ills; and it is too much to say that it is so certain that it does and will harm the body, and that this fact has, in so short a time, become a matter of such common knowledge, so known and notorious to all men, as Wigmore puts it, that it can be judicially noticed in all cases. There may be cases in which such notice may well be taken; as where the facts and circumstances are so decisive of bodily harm, actual or apprehended, that there can be no difference of opinion about it. But in cases short of that, we think the substantive fact must be found before it can be said to exist.

Nor do we regard the case in hand of the decisive character mentioned. The libellant herself, fifty-one years old, and in ordinary good health for a woman of her age, did not seem to be particularly apprehensive of bodily harm from the treatment of her husband, for she continued to cohabit with him till they left the farm the first of November, 1904, and although they never again set up housekeeping and lived together as husband and wife, yet on various occasions they occupied the same bed when visiting relatives, and occasionally had sexual intercourse up to and including January 5, 1905, two days after which he left her, much against her earnest protest and wishes, and went to Massachusetts to live, whither she went to see him, but did not, because he fled to Rhode Island to avoid her. She wrote to him, but got no answer. She saw him once, and tried to talk with him, but he would not speak to her nor see her. And up to the time this libel was brought, which was in June, 1906, the libellant desired to live with the libellee, and up to the time he left the State, she urged him to remain in Lyndon, hire a house, and live and cohabit with her as his wife.

We hold, therefore, that the essential fact of bodily harm or of a reasonable apprehension of such harm, is not established, unless we presume in favor of the judgment that the trial court inferred that fact from those certified up. But we cannot well do that on this record, especially as it says that the court decided the case "upon the findings of fact," which seems to preclude, or to make doubtful at least, the idea that the court inferred the all-essential fact from those findings.

Judgment reversed and cause remanded.[16]

MASSEY v. MASSEY.

(Appellate Court of Indiana, 1907. 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.)

HADLEY, J. This is a suit instituted by appellant against appellee for divorce. Appellant filed an amended complaint, to which appellee filed a demurrer, which demurrer was sustained. Appellant refusing to plead further, judgment was rendered against him. The ruling of the court on the demurrer is the only error assigned. The complaint, after stating the marriage and the residence of the parties, avers that they separated January 12, 1905; that during the time of their marriage appellee continuously charged appellant with being untrue to her and of being an unchaste man; that she stated to numerous good citizens of the community that he was untrue to her and unchaste, all of which she knew to be false; that she endeavored to destroy his business, and constantly upbraided him for using her money therein; that she was petulant, irritable, and constantly complaining; that she frequently asserted she cared nothing for him, for his home, or his business, and refused to take any interest in his home, when able to do so, and also, when able to do so, refused to prepare the daily meals for him and his servants; that she read frivolous literature, to the neglect of her household duties; that she, for a long time prior to and on the day of separation, was cold, abusive, scornful, and indifferent to the happiness of the appellant; that by reason thereof she kept appellant in continual distress, and the trouble destroyed his peace of mind and broke up his home.

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[16] The cases on cruelty as a ground for divorce are very numerous, of diverse character and inharmonious. See an extensive note to the principal case in 18 L. R. A. (N. S.) 300, purporting to cover all cases involving false charges of adultery as a ground for divorce. Most of the cases contain other elements. See, also, a note in 13 L. R. A. (N. S.) at page 224 (1907), for a collection of cases involving the question as to what acts of one spouse, with respect to, or actuated by, a dislike of the relatives of the other, constitute cruel and inhuman treatment.

Must the cruel treatment complained of be willful, or intended to injure? On this point, see Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632 (1891), where the professional practice of Christian Science by the wife, causing business loss to the husband and resulting in injury to his health, was held extreme cruelty, the court saying, "A malevolent motive in the party complained of need not be shown. Divorce is not punishment of the offender, but relief to the sufferer." But see Ennis v. Ennis, 92 Iowa, 107, 60 N. W. 228 (1894), Freeborn v. Freeborn, 168 Mass. 50, 46 N. E. 428 (1897), and Brown v. Brown, 129 Ga. 246, 58 S. E. 825 (1907), holding that the cruel treatment must be willful, or intended to injure.

If this complaint states facts sufficient to constitute grounds for a divorce, it must be under the fourth clause of section 1044, Burns 1901 (§ 1032, R. S. 1881), which is as follows: "Cruel and inhuman treatment of either party by the other." That there can be cruel and inhuman treatment without physical violence is now so well settled that citation of authorities is useless. What constitutes cruel and inhuman treatment must be determined by the facts of the given case. As was said in the case of Kelly v. Kelly (1883) 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732: "In considering extreme cruelty as a ground of divorce, courts have cautiously given it negative, rather than affirmative, definitions. The difficulty in giving it an affirmative definition arises from the fact that cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. 'We do not divorce savages and barbarians because they are such to each other,' said the supreme court of Pennsylvania, in Richards v. Richards (1860) 37 Pa. 225. 'We can exercise no sound judgment in such cases (divorce cases) without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules.' Richards v. Richards, supra." Mere cold neglect has been held by our Supreme Court to be cruel and inhuman treatment, in the case of Rice v. Rice (1855) 6 Ind. 100, wherein the court say: "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief."

False charges of infidelity by a wife of a husband, widely circulated in the community, may cause the keenest suffering to the husband, in comparison to which blows would be insignificant. And, where, as averred here, these false statements are persistent, continuous, and are coupled with coldness, neglect, lack of interest in family affairs, aggressive action against his means of livelihood, irritability, petulancy and scorn, to the extent of breaking up his home, we can well perceive that they might produce the depths of distress and wretchedness that would naturally cause physical impairment. Kelly v.

Kelly, supra; Holyoke v. Holyoke (1886) 78 Me. 404, 6 Atl. 827; Whitmore v. Whitmore (1882) 49 Mich. 417, 13 N. W. 800; Carpenter v. Carpenter (1883) 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; McGee v. McGee (1904) 72 Ark. 355, 80 S. W. 579; Spitzmesser v. Spitzmesser (1901) 26 Ind. App. 532, 60 N. E. 315. It is well settled that the false charge of adultery by a husband against his wife is grounds for divorce under the charge of cruel and inhuman treatment. Graft v. Graft (1881) 76 Ind. 136; Shores v. Shores (1864) 23 Ind. 546. And, in reason, a wife's like accusation against the husband should be no less available to him in his suit for her cruelty. 1 Bishop, Mar., Div. and Sep. § 1636; § 1044, Burns' 1901 (§ 1032, R. S. 1881). In a suit by the husband for divorce on account of cruel treatment, where no actual violence is averred, it must clearly appear from the facts in the case that the acts of the wife have rendered the continuance of the marital relation so intolerable to the husband as to endanger his physical well-being. The averments of the complaint show that such a condition would exist under the facts therein averred, with a man of ordinary temperament, standing and self-respect. Appellee relies upon the case of McAlister v. McAlister (1888) 71 Tex. 695, 10 S. W. 294. From the reasoning in this case, it will appear that the statutes of Texas and the decisions thereunder provide a different rule in cases of this character than that which obtains in this State, and we do not think it should be of controlling force. The court bases its decision upon the following statement: "Wisely or not, our statutes do not make occasional acts of adultery on the part of the husband a cause of divorce when sought by the wife. Otherwise, when the husband asks divorce from the wife taken in adultery."

Cause reversed, with instructions to the lower court to overrule the demurrer to the amended complaint.[17]

MYERS, C. J., ROBY, P. J., and WATSON, J., concur. COMSTOCK and RABB, JJ., dissent.[18]

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[17] In addition to the cases cited in the note to the preceding case, see note to the principal case in 7 Col. Law Rev. 621, with citation of authorities. In Russell v. Russell, 11 Times Law Rep. 579 (1895, Court of Appeal), it was held, Rigby, L. J., dissenting, that repeated accusations by the wife in public that the husband was guilty of sodomy was not cruelty. See, also, Evans v. Evans, 1 Hag. Con. 35 (1790), for general discussion of cruelty. In Anon., 2 Ohio N. P. 342 (1895), it was held that the commission of sodomy with a beast was extreme cruelty. Compare W—— v. W——, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491 (1886), where conduct of a different sort, but equally revolting, was held not to be cruelty; the court thinking that conduct, to be cruelty, should be directed at the other party. In Craig v. Craig, 129 Iowa, 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669 (1905), it was held cruel and inhuman treatment for the husband to bring another woman into his home and openly profess love for her, causing mental distress resulting in ill health. See a note in 2 L. R. A. (N. S.) 669, collecting similar cases. In Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399 (1898), it was held that a false charge of physical incompetency on the part of the wife to consummate the marriage might constitute extreme cruelty.

[18] The dissenting opinions of RABB and COMSTOCK, JJ., are omitted.

COWLES v. COWLES.

(Supreme Judicial Court of Massachusetts, 1873. 112 Mass. 298.)

Libel for divorce, in which the libellant set forth that he was married to Frances M. Dickinson, June 7, 1871; that soon after their marriage he and his wife commenced housekeeping, and that with occasional absences of the wife they continued to occupy the same house till April, 1872, since which time she has ceased to live with him; that she from the time of their marriage had been guilty of cruel and abusive treatment of him, in refusing to have any sexual intercourse with him, and had never had such intercourse, and had ever refused to have it. Wherefore he prayed that the bonds of matrimony between them might be dissolved.

The libellee was defaulted, and the libel was heard before Wells, J., who refused to grant either a divorce or a decree of nullity, solely on the ground that the utter denial of sexual intercourse was not a cause for which such a decree in either form could be made by the court. The libellant excepted.

Colt, J. This libel for divorce alleges cruel and abusive treatment only. In support of it the wife's utter denial of sexual intercourse is relied on. It is not now contended that any other cause of divorce exists.

Such conduct is not to be regarded, within a reasonable interpretation of the provision of St. 1870, c. 404, § 2, as cruel and abusive treatment. Under the like provision of Gen. St. c. 107, § 9, it has been held that the cruelty charged must appear to be such "as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger." Bailey v. Bailey, 97 Mass. 373; Peabody v. Peabody, 104 Mass. 195; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

It plainly does not go to the original validity of the marriage, and affords no ground for declaring the nullity of it. Exceptions overruled.[19]

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[19] Accord: Severns v. Severns, 107 Ill. App. 141 (1903); Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386 (1904); Johnson v. Johnson, 31 Pa. Super. Ct. 53 (1906). And see note in 14 L. R. A. 685, on "Refusal of Marital Intercourse as a Ground for Divorce." Whether refusal of marital intercourse amounts to desertion, see Fritz v. Fritz, post, p. 125. In Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. Rep. 660 (1907), refusal of marital intercourse, combined with false charges of adultery and other conduct, was held extreme cruelty.

MOSHER v. MOSHER.

(Supreme Court of North Dakota, 1907. 16 N. D. 269, 113 N. W. 99, 12 L. R. A. [N. S.] 820, 125 Am. St. Rep. 654.)

Action by Alfred Mosher against Eugenia Mosher. Judgment for plaintiff, and defendant appeals. Affirmed.

SPALDING, J.[20] Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessaries of life, and with repeatedly accusing her of having married him from mercenary motives, and of her having loved other men and of her having illicit intercourse with other men. * * *

The plaintiff was a religious man, had been a church member for 35 years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occurring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault-findings, threatenings, and complaints of the defendant seldom brought any retort from him. * * *

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[20] Part of the opinion is omitted.

The judgment of the district court is affirmed. All concur.[21]

(C) Desertion

FRITZ v. FRITZ.

(Supreme Court of Illinois, 1891. 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156.)

Appeal from the Appellate Court for the Fourth District. Heard in that court on appeal from the Circuit Court of Pope County; Hon. Oliver A. Harker, Judge, presiding.

MAGRUDER, C. J.[22] This is a bill filed in the Circuit Court of Pope County on April 17, 1889, by the appellant against the appellee, his wife, praying for a divorce from her upon the alleged grounds, that she "has willfully absented herself from your orator without any reasonable cause for the space of two years, and has been guilty of extreme and repeated cruelty." The defendant answered denying the allegations of the bill, and replication was filed to the answer. The verdict of the jury and the judgment of the trial court were in favor of the defendant. The present appeal is from the judgment of the Appellate Court affirming the judgment of the Circuit Court.

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[21] In a note to the principal case in 12 L. R. A. (N. S.) 820, it is said: "A careful search has disclosed no other case in which profanity and obscenity on the part of either husband or wife was the sole cause for divorce, either absolute or limited, on the ground of cruel and inhuman treatment. While profanity and vile epithets generally form one of the grounds for an application for relief from the marital union, yet other elements of a more serious nature have generally formed the real basis for the decree. The courts not infrequently discuss the subject of words as constituting cruel and inhuman treatment, but in practically all of these cases, while the words may be profane, yet they imply threats of physical harm." See, for a discussion of the effects of mere words, Fitzpatrick v. Fitzpatrick, 21 Misc. Rep. 378, 47 N. Y. Supp. 737 (1897); Hewitt v. Hewitt (N. J. Ch.) 37 Atl. 1011 (1897); Rosenfeld v. Rosenfeld, 21 Colo. 16, 40 Pac. 49 (1895); Shuster v. Shuster, 3 Neb. (Unof.) 610, 92 N. W. 203 (1902); Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316 (1897).

See the following miscellaneous cases: Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878 (1903), habitual use of morphine is not cruel treatment; Crutcher v. Crutcher, 86 Miss. 231, 38 South. 337 (1905), crime of "pederasty" is cruel and inhuman treatment; Vercade v. Vercade, 147 Mich. 398, 110 N. W. 942 (1907), desertion for less than statutory period is not extreme cruelty.

[22] Part of the opinion is omitted.

The first question in the case arises out of the refusal of the trial court to give the 3d, 4th, 5th, 6th and 7th instructions asked by the complainant below. These instructions, in substance, announce the doctrine, that, where a wife refuses, without good cause, to have sexual intercourse with her husband for a period of two years or more, such conduct amounts to willful desertion. Mr. Bishop, in his very able work upon Marriage and Divorce, gives this doctrine his support. 1 Bish. on Mar. & Div. (6th Ed.) §§ 778, 778a, 779. It is not, however, sustained by well considered authorities. The cases favoring it, to which we have been referred, are Heermance v. James, 47 Barb. (N. Y.) 120; Fishli v. Fishli, 2 Litt. (Ky.) 337; Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 820. In no one of these cases did the question fairly arise, whether the neglect of this one of the marital duties, without the neglect of any other of such duties, by itself constituted willful desertion.[23] The Heermance Case was an action for damages for depriving the plaintiff of the affections, comfort, fellowship, society, and aid and assistance of his wife in his domestic affairs, and arose upon demurrer to the complaint filed in the action. In the Fishli Case, the husband had abandoned his wife for the space of two years, and sought to meet the charge of such abandonment by setting up, that, a few weeks before the expiration of the two years, he had made an offer to support his wife in his own house, or in lodgings, as she might prefer. In the Sisemore Case, it appeared that the offense of the wife was not so much the one now under consideration, as her refusal to remove to a new home selected by her husband in another county.

The doctrine contended for rests mainly upon the idea, that sexual intercourse is "the central element of marriage to which the rest is but ancillary," and, while it may be urged with no little force, that the refusal of such intercourse by one of the parties to the marriage contract is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question before us is simply as to the meaning of our statute. The Divorce Act provides that a divorce may be granted where either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years." We think that the willful desertion here referred to was intended to mean the abnegation of all the duties of the marital relation, and not of one alone.

In Carter v. Carter, 62 Ill. 439, desertion is treated as synonymous with absence, and absence involves the neglect of other duties than the one in question. The Supreme Court of Maine, in speaking upon this subject, says: "Sexual intercourse is only one marital right or duty. There are many other important rights and duties. The obligations the parties assume to each other, and to society, are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced, or their breach remedied by legal process." Stewart v. Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822.

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[23] See, also, a note in 14 L. R. A. 685, distinguishing the cases cited by Bishop and collecting authorities.

The view of this subject, which commends itself to our approval, is that announced by the Supreme Court of Massachusetts in Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95, where Chief Justice Bigelow says: "The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract. The later case of Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579, does not overrule the Southwick Case, in so far as the latter holds that the refusal of matrimonial intercourse is not of itself sufficient to justify a divorce on the ground of desertion. The divorce for desertion was allowed in the Magrath Case, because, in addition to the husband's intentional and permanent abandonment of all matrimonial intercourse with his wife, he withdrew from her his companionship and the protection of his home. It is there said, after referring to the Southwick Case: "The case at bar goes much further. Here there has been for the time required by the statute, an abnegation on the part of the husband of all the chief duties and obligations, which result from the marriage contract and distinguish it from others. There is no more important right of the wife than that, which secures to her in the marriage relation the companionship of her husband and the protection of his home."

The same view has been adopted in Maine. In Stewart v. Stewart, supra, it is said: "This case therefore presents the question whether the legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years. * * * It has been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion. Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Steele v. Steele, 1 McArthur (D. C.) 505. * * * We do not think our legislature intended to call the denial of this one obligation an 'utter desertion,' while the party might be faithfully and perhaps meritoriously fulfilling all the other marital obligations."

Some importance is attached in the Stewart Case to the fact, that the Maine statute uses the word "utter" before "desertion." But we do not think that the absence of that word from our statute affects the construction of its language with reference to the point now under consideration. It is a mistake to say, as it is stated in Stewart v. Stewart, supra, and in Bishop on Mar., Div. and Separation, § 1680, that the Southwick Case is based upon a statute providing for "utter" desertion. The Southwick Case was decided in 1867, before the Massachusetts statute of 1882, referred to in Stewart v. Stewart, was passed, and the statute in force in Massachusetts in 1867 did not use the word "utter," as is shown by the remarks of the Court in Southwick v. Southwick, supra. In our opinion, refusal of sexual intercourse alone cannot be construed to mean willful desertion without reasonable cause under the Illinois statute, any more than it can be construed to mean utter desertion under the Maine statute.

* * *

At common law, whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other without any sufficient reason, a suit could be brought in the ecclesiastical courts for a restitution of conjugal rights. But those courts made a distinction between "marital intercourse," or sexual intercourse, and "marital cohabitation," or living together. They enforced the latter, but not the former. They merely required the offending party to return and live with the libellant. In such proceedings, the cessation of cohabitation warranted a decree, but the suit for restitution of conjugal rights could not be maintained on the ground of a refusal of marital intercourse. Desertion in such suits was held to signify a refusal to live together, and, in this country, the action for divorce on the ground of desertion is a substitute for the English proceeding for the restitution of conjugal rights. Black. Com. book 3, marg. page 94; 1 Bish. on Mar. & Div. (6th Ed.) § 778; Orme v. Orme, 2 Add. Ec. 382; Forster v. Forster, 2 Hag. Con. 144, 154; Stewart v. Stewart, supra; Southwick v. Southwick, supra. * * *

For the reasons thus stated, we are of the opinion, that the court below committed no error in refusing to give the instructions numbered 3, 4, 5, 6 and 7, which were asked by the complainant. * * *

The judgment of the Appellate Court is affirmed. Judgment affirmed.[24]

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[24] In addition to the cases cited in 14 L. R. A. 685, see also, accord: Watson v. Watson, 52 N. J. Eq. 349, 28 Atl. 467 (1894); Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86 (1903); Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42 (1907); Pfannebecker v. Pfannebecker, 133 Iowa, 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543 (1907). Civ. Code Cal. § 96, provides that "persistent refusal to have reasonable matrimonial intercourse" shall be evidence of desertion, justifying a divorce, "when health and physical condition does not make such refusal reasonably necessary." Held, under this statute, that an unexplained refusal by the wife for three or four weeks after her marriage was insufficient to entitle the husband to a divorce. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19 (1904). In Synge v. Synge, [1900] Prob. 180, it was held that if the wife refused to live with the husband, except upon his undertaking not to exercise his right of marital intercourse, he was justified in separating himself from her, and was not guilty of desertion. It was also said that such conduct amounts to desertion on her part. Affirmed in Synge v. Synge, [1901] Prob. 317.

PIDGE v. PIDGE.

(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 257.)

Libel for divorce a vinculo, alleging willful and utter desertion for the term of five years.

At the hearing before Putnam, J., it was proved that the respondent abused and beat the libellant, and that she thereupon left his house and never returned to him, nor offered to return. They thereupon lived apart for more than five years, respondent making no provision for her support.

Divorce decreed. Exceptions by respondent.

DEWEY, J.[25] The libellant seeks to procure a divorce from the bond of matrimony, and insists, that upon the facts stated in the case, she brings herself within the provisions of St. 1838, c. 126. This statute enacts, that "a divorce from the bond of matrimony may be decreed in favor of either party, whom the other shall have willfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted." The statute seems to prescribe three things as essential to the maintenance of such libel. 1. A willful and utter desertion of the libellant by the libellee. 2. That such desertion by the libellee be continued five years consecutively. 3. That the desertion be without the consent of the libellant.

It is obvious, therefore, that the mere fact that the parties have lived in a state of separation for five years, is wholly insufficient to bring the case within the statute. The libellant must proceed a step further, and show that this separation was occasioned by the desertion of the libellee, and that this desertion was without the consent of the libellant.

It is quite apparent that in the present case these facts are not shown in the ordinary and literal sense of the words of the statute. The object of the libellant's evidence was rather, as it would seem, to show such alienation of feeling on the part of the husband, accompanied with personal abuse, and gross negligence in providing for her wants, as would justify her in leaving him, and continuing to reside apart from him with her friends, during the term of five years.

We shall assume, in the further consideration of the subject, that the libellant has satisfactorily shown that her separation from her husband was occasioned by his extreme cruelty, and that her withdrawing from him was reasonably justified by fears as to her personal safety. This, as a matter of fact, was established at the hearing before a single judge, at nisi prius, and we do not go behind the report, as to the facts. The present inquiry is, whether a separation, under such circumstances, can be held to be a desertion by the husband, and properly authorize us to grant a divorce a vinculo matrimonii.

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[25] The statement of facts and the opinion are abridged. The dissenting opinion of Putnam, J., is omitted.

On the part of the libellant it is contended, that the term "desertion" may reasonably be so construed as to include the willful neglect of the husband to discharge the duties of the marriage relation, either by gross neglect to make suitable provision for his wife, or by exciting in her well-grounded fears for her personal safety; and that if, for such or any other sufficient cause, she leaves his house and seeks protection elsewhere, and continues this separation for the term of five years—the husband doing nothing in the mean time to change the relation between the parties—this would present a case within the statute.

Before the passage of this statute, the only grounds for a divorce from the bond of matrimony between parties competent to form this connexion, were, the commission, by one of the parties, of the crime of adultery, or a conviction of some crime of that infamous character, which should deserve, and have received a judicial sentence of punishment in the state prison or county jail, for a period of not less than seven years. Rev. St. c. 76, § 5. By the provisions of St. 1838, c. 126, a great change is introduced, and a divorce from the bond of matrimony may be now decreed without any crime having been committed by the libellee, cognizable by a court of criminal jurisdiction. This change of the law of divorce has been, by the terms of the statute introducing it, confined to a single class of cases, and that specified with a good degree of precision. By the terms of that statute, the libel is to be filed and the divorce decreed in favor of that party "whom the other shall have willfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted." Beyond the cases provided for in the statute, it is neither our duty nor inclination to give facilities to the dissolution of the marriage contract. Had it been the purpose of the legislature to authorize a divorce from the bond of matrimony for extreme cruelty, or gross neglect to provide suitable maintenance for the wife, we must suppose that these cases would have been specified in the statute of 1838; and the fact that they are not so specified seems conclusive on the point of the intention of the legislature.

We are the more confirmed in this view from the fact, that the three subjects of desertion, extreme cruelty, and gross neglect to provide suitable maintenance, are all specially provided for in Rev. St. c. 76, § 6, and made the foundation for a divorce from bed and board. All these cases being thus by the revised statutes provided for by one and the same law, the legislature have selected the case of willful desertion, and made it the subject of a special provision, leaving the other cases to be governed by the former provisions of the revised statutes. It seems to us, therefore, that the statute of 1838 is limited to the case of willful desertion by the libellee; and that extreme cruelty, or neglect to provide suitable maintenance for the wife, by reason of which she is justified in leaving her husband, does not present the case of desertion by the husband, which is contemplated and required by this statute. To hold otherwise would be adding to the provisions of this statute, and opening a door for the greatest latitude in granting divorces.

The broad ground is, as I understand, assumed by the libellant, that if for any good and sufficient reason arising from the misconduct of the husband, the wife shall withdraw from his society and his dwelling, she may, by thus withdrawing, and continuing to live apart from him for five consecutive years, put herself in a situation to demand, as a matter of right, a divorce from the bond of matrimony, under this statute. To what extent will this doctrine carry the provisions of the statute? Personal violence is not the only misconduct on the part of the husband, that might justify the wife in withdrawing from his roof. There are other sufferings not less intense than those occasioned by bodily wounds. Angry words, coarse and abusive language, grossly intemperate habits, might bring greater sufferings upon a refined and delicate woman, than a single act of violence upon her person, and might well, in the reasonable judgment of the public, authorize her withdrawing from the society of her husband. But the legislature has annexed no such penalty, as a divorce from the bond of matrimony, for causes like those just enumerated. Yet such would be the practical construction of the statute, if it be admitted, that in cases where the wife leaves her husband for justifiable cause arising out of his misconduct, such separation is legally and technically a desertion by the husband.

It is strongly urged that the separation by the wife, in cases like the present, is virtually an involuntary separation on her part; that she is not to be treated as having acted as a free agent in withdrawing from her husband; and therefore that she cannot be properly said to have deserted him, and that her separation from him ought not and cannot properly be urged against her, on this occasion. This argument is, in my opinion, entirely misapplied, when urged, as it now is, to sustain a libel filed by the wife, charging her husband with desertion. It would be entirely sound, and availing too, if urged in defence of the wife, on the husband's seeking a divorce, and alleging, as the ground for the application, a willful desertion by the wife. * * *

Libel dismissed.[26]

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[26] Contra: Sickert v. Sickert, [1899] Prob. 278; Koch v. Koch, [1899] Prob. 221; Curlett v. Curlett, 106 Ill. App. 81 (1903); Lister v. Lister, 65 N. J. Eq. 109, 55 Atl. 1093 (1903), affirmed in 66 N. J. Eq. 434, 57 Atl. 1132 (1904); Rigsby v. Rigsby, 82 Ark. 278, 101 S. W. 727 (1907); Davenport v. Davenport, 106 Va. 736, 56 S. E. 562 (1907); Hudson v. Hudson, 59 Fla. 529, 51 South. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278 (1910).

JAMES v. JAMES.

(Supreme Court of New Hampshire, 1878. 58 N. H. 266.)

Libel, for divorce. Cause assigned, the willing absence of the husband from the wife for three years together, without making suitable provision for her support. The libellant, previous to her marriage, lived with her parents in this state. At the time of their separation, the parties lived in Canada. In July, 1871, the libellant procured money from her father and returned to this state, where she has since lived. She left the libellee because of his intemperate habits, and his failure to support her. He did not otherwise, ill-treat her. He had no property, but, when he would work, could earn $36 a week, and had work to do when he would do it. Libel dismissed, the libellant excepting.

SMITH, J.[27] * * * The remaining question is, whether it has been shown that the libellee has willingly absented himself from his wife for three years together, without making suitable provision for her support.

There are decisions which hold that if a husband so abuses his wife as to render living with him personally unsafe for her, and for that reason she leaves him, she can maintain against him a suit for divorce, relying on such conduct as constituting desertion by him. 2 Dane Ab. 308; Reeve Dom. Rel. 207; Wood v. Wood, 27 N. C. 674; Almond v. Almond, 25 Va. 662, 15 Am. Dec. 781; Camp v. Camp, 18 Tex. 528. Such conduct seems, upon principle, to show the intent of the husband to desert, on the familiar rule that a person is intended to presume the natural and probable consequences of his acts; that there can be no distinction between his intending to oblige her to leave him, and intending himself to leave her. Bishop on Mar. and Div. 515. * * *

Pidge v. Pidge, 3 Metc. (Mass.) 257, was a libel for divorce a vinculo, alleging the willful and utter desertion of the libellant by the respondent. The evidence showed that the latter, without provocation, abused and beat the libellant, whereupon she left him, and never returned nor offered to return to him, and the respondent made no effort to cohabit with her, and made no provision for her support. It was held by a majority of the court, under a statute which enacted that a divorce a vinculo might be decreed in favor of either party whom the other shall have willfully and utterly deserted for the term of five years consecutively without the consent of the party deserted, that the libel could not be maintained. The decision appears to have been put upon the ground that desertion, extreme cruelty, and gross neglect to provide suitable maintenance, were made the foundation by statute for divorce a mensa et thoro, and that it would be adding to the provisions of the statute to hold that the wife may treat the husband as the deserting party, when she is compelled by his misconduct to live apart from him. It does not appear that the question, whether the ill-conduct of the husband was intended to bring about a separation made necessary for the safety of the wife, was brought to the attention of the court. The statute was subsequently amended so as to include such cases.

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[27] Part of the opinion, on the question of the libelee's ability to support his wife, is omitted.

The very able dissenting opinion, by Mr. Justice Putnam, affords conclusive reasons why, under a statute like ours, a different result should be reached. The learned judge said that, "to all legal and reasonable intendments, the wife, who is obliged to fly from her husband's violence and home into the street for her preservation, is to be considered to be there not of her own free will, but by reason of the force and violence of her husband. He has driven her from him, and it would be a perversion of terms to say that she, under those circumstances, deserted him."

The case finds that the libellant was compelled to separate from her husband because of his drunkenness, and of his neglect to furnish her and her child with the means of support. There was no other alternative for her except to remain and suffer, and perhaps starve. The law is not unreasonable, and does not require of the wife such sacrifice of her comfort or existence. The living with an habitual drunkard, in the wretchedness, suffering, and poverty resulting from such a life, may be more intolerable to a wife than occasional acts of cruelty. The natural and probable result of the libellee's drunken life and neglect to provide for the support of his wife was that which actually did take place. Having no home of her own, and no means of support, and the home he was bound to provide being no longer habitable, she returned to the home of her father. Judged by his acts and their natural result, the libellee intended to produce the separation of his wife from himself.

A wife abandoned by her husband in another state, who, though able, makes no provision for her support, may return to her parents here, and if subsequently the desertion continues for three years together, no provision for her support being made by him, she is entitled to a divorce. Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Kimball v. Kimball, 13 N. H. 222; Payson v. Payson, 34 N. H. 518. There is no distinction in principle between the desertion by the husband under such circumstances, and the compulsory separation caused by his ill-conduct. In the one case he abandons her to suffer and starve by his voluntary desertion of her; in the other he leaves her to the same fate by his voluntary ill-treatment and neglect.

We think, upon the facts shown in this case, the libellant is entitled to treat the result of her husband's ill-conduct and neglect of herself as willing absence on his part. If at the trial term she can show that, during the period of absence alleged, the libellee had the ability to provide for her support, a divorce will be decreed; otherwise, the libel must be dismissed.

Case discharged.[28]

Bingham, J., did not sit.

DOUGLASS v. DOUGLASS.

(Supreme Court of Iowa, 1871. 31 Iowa, 421.)

Action for divorce. The district court dismissed the plaintiff's petition, and rendered judgment against her for costs; she appeals.

Cole, J. The plaintiff bases her claim for divorce upon the fourth subdivision of Revision, § 2534: "When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years." There is no conflict in the evidence as to the facts of the case. The parties were married in September, 1858; they lived together happily until the 14th day of September, 1867, during which time there were four children born to them, three of whom had died. Prior to the time last stated, the defendant became insane, and was sent to the asylum at Mt. Pleasant, and a guardian for his property, etc., was appointed. At that date, having been discharged from the asylum as cured, the defendant returned to his friends, but refused to live with plaintiff as his wife; he made his home with his mother in the same neighborhood, and engaged in his usual work, but refused to provide in any way or part for plaintiff or their child. In

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[28] See note to previous case.

See the following cases involving miscellaneous points: In De Laubenque v. De Laubenque, [1899] Prob. 42, it was held that the husband was guilty of desertion, though they had never lived together, where the wife was willing to live with him until she learned that he was living in adultery with another woman. In the following cases the husband was held guilty of desertion, though he continued to provide money for his wife's support: Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579 (1870); Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717 (1898); Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653 (1904). In re Ralston's Appeal, 93 Pa. 133 (1880), semble, contra. In Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851 (1906), it was held that a wife's refusal to emigrate from England to America was desertion. In the note to this case in 4 L. R. A. (N. S.) 145, it is said that Franklin v. Franklin is the first case to squarely decide this point. There are many cases involving the wife's duty to follow her husband within the same country. See the note in 4 L. R. A. (N. S.) 145, for cases on this point. In Albee v. Albee, 141 Ill. 550, 31 N. E. 153 (1892), it was held that the wife was not guilty of desertion in refusing to live in the house of her mother-in-law. And see note in 13 L. R. A. (N. S.) 222 (1907), on "Relations between One Spouse and Relatives of the Other as Affecting the Question of Desertion." In the following cases it was held that one spouse is justified in leaving another only where the leaving is due to such conduct as would constitute ground for divorce: Laing v. Laing, 21 N. J. Eq. 248 (1870); Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156 (1891); Sarfaty v. Sarfaty, 59 N. J. Eq. 193, 45 Atl. 261 (1900); Barnett v. Barnett, 27 Ind. App. 466, 61 N. E. 737 (1901); Walton v. Walton, 114 Ill. App. 116 (1904); Crounse v. Crounse, 108 Va. 108, 60 S. E. 627 (1908).

February, 1868, there was a judicial examination as to his condition, and he was pronounced sane, and then settled with his guardian, who was discharged. At this examination the defendant asserted that he never intended to live with plaintiff again, but gave no reason, and refused to do so when asked. In the April following (1868), the defendant was again sent to the asylum, and another guardian appointed. The defendant corresponds with his friends, but refuses to write to his wife, although she has written him and urged him to answer. The defendant has never abused the plaintiff, nor have they had any particular quarrel. Plaintiff has earned her own living and the support of her child since he first went to the asylum; she is a woman of excellent character. This suit was brought in March, 1870.

This evidence satisfactorily establishes the fact that the defendant has willfully deserted his wife without a reasonable cause, and that he has absented himself for the space of two years. This is not controverted; but it is claimed that the statute requires that both the desertion and absence shall be without a reasonable cause. For the purposes of this decision that construction might be conceded, though it may well be questioned whether the true and correct construction is not that the wife shall be entitled to a divorce when the defendant willfully deserts her without a reasonable cause and absents himself for two years. See Hewes v. Hewes, 7 Gray (Mass.) 279; Besch v. Besch, 27 Tex. 390. But, even if it be held that the reasonable cause applies equally to the absence as to the desertion, then the inquiry as to the meaning of the term "reasonable cause" in this connection. Does it mean that the husband, having willfully deserted his wife, shall, by showing a reasonable cause for his continued absence, defeat the wife's right of action? If so, suppose he should show that he became engaged in a very profitable mining operation and was accumulating wealth very rapidly for his family, which would have been sacrificed by his return to his wife within the time? This would ordinarily be regarded as a reasonable cause for a protracted absence. Or, suppose he became unjustly suspected of the crime of murder and was wrongfully arrested and committed for trial, whereby he was detained beyond the two years. This would surely be a reasonable cause for his delay in returning. But this is not the meaning of the statute. The statute means that if the husband willfully deserts his wife when she has not by her conduct given him a reasonable cause, and shall absent himself for two years when she has given him no reasonable cause for remaining away, then she shall be entitled to a divorce. The reasonable cause of the statute can only be established by showing wrongful conduct on her part, amounting to a good excuse for his absence. No other reasonable cause for the two years' absence than that arising from the acts, declarations or conduct of the wife can be shown to defeat her right of action. In other words, the absence of the husband must be excused by the fault of the wife, and not by the fault or misfortune of the husband.

This must be the correct construction of the statute. For, if the term "reasonable cause" applies equally to the "desertion" and the "absence," then it must apply to them in the same sense. And it will not admit of controversy that when a husband willfully deserts his wife, he can justify that action only by showing wrong or fault on her part. As it is clear that no fault or misfortune of his will excuse his willful desertion, so no fault or misfortune of his will excuse his absence for the space of two years. The statute, it will be observed, does not require that the absence shall be willful.

How much soever we may sympathize with the defendant in his misfortune and would be ready to commend the self-sacrifice and devotion that would lead the plaintiff to cling closer to him, even though his affection, like his reason, may be permanently clouded, yet the statute is the measure of the plaintiff's rights, and it is our duty to enforce it. Reversed.[29]

BECK, J., dissenting.

STORRS v. STORRS.

(Supreme Court of New Hampshire, 1894. 68 N. H. 118, 34 Atl. 672.)

Libel for divorce, for abandonment, filed September 27, 1893. The parties were married January 1, 1878, and lived together until June, 1882, when the defendant abandoned the plaintiff without cause and without his consent. In the fall of 1882 the defendant became incurably insane and incapable of performing her marital duties. In February, 1883, she was placed in the asylum for the insane, where she has ever since remained. She appeared by a guardian ad litem.

CARPENTER, J. A libel may be maintained and a divorce decreed against an insane person for causes of divorce which arose and became complete before the defendant became insane. Mansfield v. Mansfield, 13 Mass. 412; Mordaunt v. Moncrieffe, L. R. 2 Sc. & Div. App. 374. Insanity at the time of the commission of the acts constituting the ground of divorce is a full defence. Broadstreet v.

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[29] In Blandy v. Blandy, 20 App. D. C. 535 (1902), contra, where the statute read, "For willful desertion and abandonment by the party complained of against the party complaining, for the full interrupted space of two years," Alvey, C. J., said: "For the continued desertion must depend upon the continued intention, and, as has been well said, but for the insanity of the wife she may have repented and returned to her husband before the expiration of the statutory period. Storrs v. Storrs, 68 N. H. 118 (1894), 34 Atl. 672; Nichols v. Nichols, 31 Vt. 328, 331 [73 Am. Dec. 352]; Pile v. Pile, 94 Ky. 308 [22 S. W. 215]." In Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708 (1908), also contra, where the statute read, "Where either party willfully abandons the other without just cause, for a period of two years," Good, C., said: "We are of the opinion that the statute means and contemplates that the abandonment should be willfully continued by the offending party for the full period of two years."

Broadstreet, 7 Mass. 474; Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352.[30]

Abandonment, to constitute a cause of divorce, must continue for three years together. P. S. c. 175, § 5. The time during which the defendant has been insane cannot be included in computing the statutory period. But for her insanity, it may be that she would have repented and returned to her husband.

Libel dismissed.[31]

CHASE, J., did not sit; the others concurred.

DANFORTH v. DANFORTH.

(Supreme Judicial Court of Maine, 1895. 88 Me. 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. Rep. 380.)

WALTON, J.[32] The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. Stewart v. Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In Kennedy v. Kennedy, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted. R. S. c. 60, § 2. And we think that if a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and can not be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

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[30] Accord: Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118 (1903); Andrews v. Andrews' Committee, 120 Ky. 718, 87 S. W. 1080, 27 Ky. Law Rep. 1119 (1905).

[31] Accord: Blandy v. Blandy, 20 App. D. C. 535 (1902); Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708 (1908).

[32] Only the opinion is given.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion will be interrupted, or regarded as condoned, and can not be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete,—that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.[33]

(D) Imprisonment

LEONARD v. LEONARD.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 151, 23 N. E. 732, 6 L. R. A. 632, 21 Am. St. Rep. 437.)

C. Allen, J.[34] The libellant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years and six months; and the question presented to us is whether such a sentence passed in another State is a good cause of divorce here. Pub. St. c. 146, § 2, provides that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction." The first statute in this Commonwealth making a sentence to imprisonment a cause of divorce was Rev. St. c. 76, § 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards, by St. 1838, c. 126, and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offence, the nature of which was known to the Legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable here at all. The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this Commonwealth. Beard v. Boston, 151 Mass. 96, 23 N. E. 826. No instance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was intended, it would be natural to say so in distinct language, as in Rev. St. c. 144, § 34. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of Pub. St. c. 146, § 2. Martin v. Martin, 47 N. H. 52, 53.

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[33] In Kennedy v. Kennedy, 87 Ill. 250 (1877), accord, the deserted husband went to the wife, who was at fault. Walker, J., said (page 254): "Had she gone to his house and they had so cohabited, then there would have been entirely a different question presented. So, if she had offered to return, and he had refused to receive her at his home." In Burk v. Burk, 21 W. Va. 445 (1883), the facts were similar to those in the Kennedy Case, except that the cohabitation was more extensive. In speaking of the Kennedy Case, Johnson, President, said (page 454): "This is the only case, so far as I know, in which such doctrine is held. We cannot approve it. We think it wrong in principle and decidedly dangerous to good morals in its tendency."

In the following cases, the deserting spouse returned, and it was held that the period of abandonment was interrupted: Ex parte Aldridge, 1 Swab. & T. 88 (1858); Gaillard v. Gaillard, 23 Miss. 152 (1851); Woolfolk v. Woolfolk, 96 Ky. 657, 29 S. W. 742 (1895). The period of abandonment is also interrupted by a bona fide offer to return on the part of the deserting spouse. Loux v. Loux, 57 N. J. Eq. 561, 41 Atl. 358 (1898); McGowan v. McGowan (Tex. Civ. App.) 50 S. W. 399 (1899); Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938 (1906). If the offer to return is in fact made in good faith, the deserted spouse has no right to assume that it is insincere and untruthful, without investigation. Meier v. Meier, 68 N. J. Eq. 9, 59 Atl. 234 (1904). An offer to return is not made in good faith, if the husband at the time of making the offer is living in adultery, or willingly permits the wife to believe that he is. Lisler v. Lisler, 65 N. J. Eq. 109, 55 Atl. 1093 (1903). In Graves v. Graves, 88 Miss. 677, 41 South. 384 (1906), the deserting wife returned to her husband's house, but refused to sleep with him; held, the abandonment was not interrupted.

[34] Only the opinion is given. At the hearing below the libel was dismissed.

Libel dismissed.[35]

HOLLOWAY v. HOLLOWAY.

(Supreme Court of Georgia, 1906. 126 Ga. 459, 55 S. E. 191, 7 L. R. A. [N. S.] 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164.)

Cobb, P. J.[36] * * * The right of the libellant to a divorce results from the conviction and sentence. There are three essential ingredients in the ground for divorce; the commission of the offense involving moral turpitude, the conviction for the same, and a sentence for a term of two years or longer in the penitentiary. When this state of affairs is shown to exist, the law declares the libellant is entitled to a divorce. Can this right given by statute be destroyed by an executive pardon? The pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction. He is no longer infamous; he may vote, hold office, and perform other public functions. Rights which have accrued to individuals as a result of the conviction are not affected by the pardon.

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[35] Accord: Klutts v. Klutts, 5 Sneed (Tenn.) 423 (1858); Martin v. Martin, 47 N. H. 52 (1866). In a few states—e. g., Delaware, Indiana, Kentucky, Michigan, Minnesota, Nebraska, Pennsylvania, and Wyoming—the statutes expressly declare that a conviction and sentence in another state or country shall be ground for divorce. In a few states—e. g., Maine, Michigan, Rhode Island, and Wisconsin—the statutes declare that conviction of certain crimes shall work a dissolution of marriage without legal process. See extended note to State v. Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928 (1895), in 31 L. R. A. 515, collecting the statutes of various states.

[36] Only that part of the opinion relating to the effect of a pardon is given. Question arose on a demurrer to the libel, stating a conviction of voluntary manslaughter, and sentence of twenty years, followed by a pardon. Demurrer was overruled, and respondent excepted.

Mr. Bishop in his work on Marriage, Divorce and Separation, §§ 444, 1807, says, that where conviction for a crime is declared to be a ground for divorce it is a defense to a divorce suit to show that the convict has been pardoned. He cites no authority for this statement. He does refer to the case of Young v. Young, 61 Tex. 191, where it was held that the commutation of the sentence of one convicted of a felony was not equivalent to a pardon. The statute of Texas provided that if a party to a marriage was convicted of a felony and imprisoned in a State prison, this should be a ground for divorce, provided that no suit could be maintained for the conviction of either party until twelve months after final judgment of conviction, nor then if the governor should have pardoned the convict. In that case the governor had commuted the sentence of the convict within twelve months after final judgment; and this was held not to amount to a pardon within the meaning of the statute.

Mr. Nelson in his work on Divorce and Separation says that it would seem that if before the trial of the suit for divorce the convict is pardoned, the divorce should not be granted. He cites no authority for the proposition. Reference is made to the case of Young v. Young, supra, and also to the case of State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928. In that case it was held that the reversal of a sentence of one convicted of a felony did not have the effect of restoring the conjugal rights taken away by virtue of a statute which declared that a sentence of imprisonment for life should dissolve the marriage of the person sentenced.

Mr. Keezer in his recent work on Marriage and Divorce says that no pardon granted after the decree of divorce will restore such party to his or her conjugal rights. To sustain this proposition he cites the case of Young v. Young, supra, and Handy v. Handy, 124 Mass. 394. In the case last cited the facts were peculiar, and it is impossible to tell from the meager statement in the report exactly what was the extent of the ruling.

We have been able to find no decision which is a direct ruling on the question now before us. We think the better view is that the pardon of the convict does not destroy the right to a divorce, declared by statute to arise upon conviction and sentence.[37]

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(E) Subject Note on Miscellaneous Grounds for Divorce

Adultery, cruelty, desertion, and imprisonment are the most common and important grounds for divorce. But in many states divorces, either a vinculo or a mensa et thoro, are granted for other reasons. See Stimson, Am. Stat. Law, § 6201 (2), impotence; § 6201 (5), intoxication habit; § 6201 (6), nonsupport; § 6201 (8), disappearance of either party; § 6201 (10), joining a religious sect disbelieving in the marriage relation; § 6201 (13), for causes rendering the marriage originally void or voidable, e. g., incestuous marriage, bigamous marriage, mental incapacity, fraudulent marriage, antenuptial pregnancy, etc.; § 6201 (15), indefinite causes at discretion of the court; § 6201 (16), voluntary separation for a certain period; § 6201 (18), incurable insanity; § 6201 (19), concealment of a loathsome disease; § 6213, omnibus clauses, e. g., "for any misconduct as permanently destroys the happiness of petitioner and defeats the purpose of the marriage relation," "for any other cause deemed by the court sufficient, if satisfied that they can no longer live together," "for the habitual indulgence of a violent and ungovernable temper," etc. See, also, the following references: Note in 39 L. R. A. 262, at page 264 (1897), whether use of drugs comes within intoxication or cruelty clauses; note to Mohler v. Shank, 93 Iowa, 273, 61 N. W. 981, 57 Am. St. Rep. 274 (1895), in 34 L. R. A. 161, on insanity as a ground for divorce; note to Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95 (1896), in 34 L. R. A. 449, on drunkenness as a ground for divorce; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054 (1906), who is an habitual drunkard; Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 820 (1896), and Jorden v. Jorden, 93 Ill. App. 633 (1901), definition of "impotence." Under the Kentucky statute, providing for a divorce where the parties have lived apart for five consecutive years next before the application, a divorce will be granted, though it appear that the separation was due to the fault of the party asking it, Clark v. Clark (Ky.) 53 S. W. 644 (1899), and the living apart is voluntary within the meaning of this statute, where the husband is imprisoned for life, since he is at fault, Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. 403 (1897). Sodomy is a proper cause under the Washington statute (any cause deemed by the court sufficient). Poler v. Poler, 32 Wash. 400, 73 Pac. 372 (1903). But the mere fact that the parties quarrel and live together unhappily is not a cause under this statute. Stanley v. Stanley, 24 Wash. 460, 64 Pac. 732 (1901); Wheeler v. Wheeler, 38 Wash. 491, 80 Pac. 762 (1905). Failure to support is no ground for divorce, where the husband has not the means or ability to furnish support. Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642 (1897); Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389 (1904); Deneen v. McLeod, 21 C. S. 54 (Quebec 1901), inability due to insanity.

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[37] In several states—e. g., Arizona, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming—it is expressly provided that a pardon shall have no effect on the right to divorce. See statutes collected in 31 L. R. A. 515 (1895). While the principal case seems to be the only decision involving the precise question, where no statute controls, the principle involved—that the effect of the conviction on the marriage relation is determined by the original sentence—is supported by the following cases: Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843 (1897), and Sargood v. Sargood, 77 Vt. 498, 61 Atl. 472 (1905), holding that, where the sentence is for a maximum term, an allowance for good behavior is to be disregarded. And see, also, State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928 (1895); Cone v. Cone, 58 N. H. 152 (1877); Handy v. Handy, 124 Mass. 394 (1878). See note to principal case in 7 Col. Law Rev. 54, entitled "Effect of Pardon on Divorce for Conviction of Crime."

III. SPECIAL DEFENSES

(A) Collusion

THOMPSON v. THOMPSON.

(Supreme Court of Michigan, 1888. 70 Mich. 62, 37 N. W. 710.)

Bill for divorce. Decree dismissing bill affirmed. The facts are stated in the opinion.

CHAMPLIN, J. In this case the complainant filed his bill praying a divorce from the defendant, on the ground of cruel and inhuman treatment. He averred in his bill—

"That the acts done and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity, or procurement of your orator, and that such bill is not founded upon or exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto, or between your orator and any other person."

Section 6232, How. Ann. St., provides:

"No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent."

The bill of complaint was taken as confessed by the defendant after personal service of subpœna upon her.

After testimony had been taken before a commissioner, the court ordered the complainant to appear personally before the court, and give testimony in the cause. From his testimony it appears that, before the bill was filed, complainant made offers to his wife to get her to release all interest in his property. He testified:

"I told her I would not pay her the $500 unless she would get a divorce, or let me,—I did not care which; that I was going to have, and have things solid, or I would not pay anything; that I was going to get clear if I paid that much. I told her if she would make out the writings that way, so that I could get a divorce, or she could,—I did not care which,—I would pay her the $500 just as she wanted it. She wanted I should get the divorce if I paid her for it. She did not want any. I told her I would not pay unless I got one."

After this she executed a quitclaim deed, and signed an agreement, set out in full in the record, as follows:[38] * * *

Complainant then paid her $500, and filed his bill in this cause.

The circuit court dismissed the bill of complaint, and complainant appeals.

His counsel claims that the statute only refers to that class of cases where parties, without any cause for a divorce, agree together collusively to obtain a decree; and that in this case the testimony shows that complainant had a legal cause for divorce.

We do not feel called upon to decide whether the complainant had a legal cause for divorce under the testimony. The agreement made was in contravention of the statute. It is immaterial whether complainant had cause for divorce or not. The statute is based upon public policy, which forbids the annulment of the marriage contract by the agreement of the parties. Such an agreement is collusive, and a fraud upon the court, which requires a positive averment that the bill of complaint is not exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto. Chancery rule 95.

The decree of the circuit court is affirmed.[39]

SHERWOOD, C. J., and MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

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[38] The text of the agreement is omitted. After reciting that husband and wife had separated in consequence of mutual disagreements and had agreed to live apart, it provided that the wife was to receive $500 in lieu of dower and other interest in the husband's property, that she was to support herself, contract no debts for which the husband should be liable, and, in case he sued for divorce, that "she will put him to no additional costs therein, and make no claim for allowance, alimony, or maintenance in said divorce proceedings."

[39] Accord: Barnes v. Barnes, L. R. 1 Prob. & Div. 505 (1868), semble; Lloyd v. Lloyd, 1 Swab. & T. 567 (1859); Butler v. Butler, 15 Prob. Div. 66 (1890). But see Harris v. Harris, 4 Swab. & T. 232 (1862). An agreement to institute divorce proceedings for a cause which does not exist is collusive, even though there may be some other cause. Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313 (1888). The fact that one, or even both, the parties believe the agreement to be free of legal or moral wrong, is immaterial, Branson v. Branson, 76 Neb. 780, 107 N. W. 1011 (1906). Collusion implies concerted action; hence a concealment of material facts by one party is not collusion. Hunter v. Hunter, [1905] Prob. Div. 217. It is not collusion for the husband to make the wife a reasonable allowance while suit is pending, in order to save the expense of an application for alimony. Barnes v. Barnes, L. R. 1 Prob. & Div. 505 (1868). In Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. Supp. 215 (1904), it was held that the fact that the wife makes a provision for the husband's future support is not a badge of fraud or collusion, or even a suspicious circumstance requiring investigation. For good general discussion, see Churchward v. Churchward, [1895] Prob. Div. 7; Griffiths v. Griffiths, 69 N. J. Eq. 689, 60 Atl. 1090 (1905).

TODD v. TODD.

(Court of Probate and Divorce, 1866. L. R. 1 P. & D. 121.)

THE JUDGE ORDINARY.[40] I feel constrained to come to the conclusion that this is not a case in which the Court can give relief, because the parties have been acting together in collusion. * * * From this testimony I have come to the following conclusions of fact: That, when Mr. Todd came to Europe, although personally he kept free from all communication with his wife, he did, through the agency of his sister, manage to communicate to her that he was going to Paris; that, having promised to give her an opportunity of getting a divorce when he got rich, he went to Paris, informing her of the address to which he was going, for the express purpose of fulfilling the promise; and that, in giving her that address, he intended that she should obtain evidence of the act of adultery he was about to commit. I conclude also that she was consenting to this state of things. And I think, in short, that she and her husband were acting in concert together, that the arrangement between them was, that he was to commit adultery in order that she might obtain a divorce, and that he was to give her the address where he was going to commit adultery, in order that she might obtain evidence of it. She failed to obtain the necessary evidence on the first occasion, although he may probably have committed adultery, for he says in one of his letters that he has done all that is required.

Having come to that conclusion as to the previous transactions, in what light am I to regard the subsequent transactions at Spa and at Paris? The conclusion I have arrived at is, that his second visit to Paris was made for the express purpose of committing adultery, and of being detected. And whether anything passed openly between him and young Mr. Mardon to shew that the latter was at Spa for the purpose of watching him or not, I am satisfied that Mr. Todd, in taking this stranger to live with him in the way that has been described, knew that he was the person who was to give the necessary evidence, and entered into that close communication with him for the purpose of enabling him to give that evidence.

[His Lordship referred to the thirtieth section of the Divorce Act of 1857 (20 and 21 Vict. c. 85), and to the case of Lloyd v. Lloyd & Chichester, 1 Sw. & Tr. 567, 30 L. J. (P. M. & A.) 97, and then said:]

It is extremely difficult to define collusion, or to describe it by any periphrasis, nor do I propose to do so. But it seems to me that where, as in this case, the husband has promised the wife to commit adultery in order that she may obtain a divorce, and she has consented, as I find that she has done, to take the course indicated to her by the husband, namely, that of watching him in order to obtain evidence of his adultery, and where the adultery charged has been committed with that understanding between the parties, and the evidence has been obtained by that means, it is impossible to say that the parties have not been colluding together and playing into one another's hands in presenting the petition and prosecuting the suit. Having come to that conclusion it is my duty to dismiss the petition and I do so accordingly.[41]

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[40] Only the opinion is given. The reference to the evidence is omitted.

(B) Connivance

NOYES v. NOYES.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 20, 79 N. E. 814, 120 Am. St. Rep. 517, 10 Ann. Cas. 818.)

Libel, filed November 16, 1904, for divorce on the ground of adultery alleged to have been committed with one Dodge.

The answer contained a general denial, and alleged condonation and connivance. * * *

The judge ordered that the libel be dismissed. To this order and to the ruling stated above the libellant alleged exceptions.[42]

Hammond, J. The trial judge found that the libellant arranged, as stated in his testimony which is recited in the bill of exceptions, with one Dow that an opportunity should be afforded the libellee by permitting her and the co-respondent to pass the evening of November 5 alone in Dow's house, without interference and interruption by other persons, although such permission had theretofore on the morning of the preceding day been refused the libellee by Mrs. Dow, and having so found, "ruled as matter of law that the facts so found were connivance on the part of the libellant." He thereupon ordered that the libel be dismissed, "and to the rulings aforesaid and said order the libellant duly excepted." In an amendment to the bill it is stated that the finding was made only upon the evidence recited in the bill.

It is contended by the libellant that the only question arising on the record is whether the testimony of the libellant, which is the only testimony reported, shows as matter of law connivance; but we do not so interpret the record. The only ruling made was that certain facts found by the trial court constituted in law connivance, and the question whether the evidence warranted the finding does not seem to have been raised. The evidence upon which the finding was made was circumstantial to a certain extent; and according to the relative degree of credit to be given to the libellant's denials of inferences which might be drawn against him from the facts stated by him, the finding might be either way. The judge evidently placed more reliance upon the legitimate inferences from the facts stated by the witness than he did upon the denial of the inferences. The witness was before him, and as he went on the judge had an opportunity by observing him to test his sincerity in his denials.

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[41] But the fact that one spouse commits adultery, for the purpose of affording grounds for a divorce, does not bar the other's right to a divorce, where the commission of the offense is not the result of concerted action. Crewe v. Crewe, 3 Hagg. Ecc. 123 (1800). In Cowan v. Cowan, 23 Misc. Rep. 754, 53 N. Y. Supp. 93 (1898), plaintiff sent her son to inform her husband that she desired a divorce, the husband committed adultery to furnish a ground for the action, and the son informed plaintiff of the facts: held, a divorce will be denied, though plaintiff was ignorant of the collusion between the son and defendant.

[42] Part of the statement is omitted, as the facts are sufficiently stated in the opinion.

Even if the question whether the finding is sustained by the evidence is before us, we are of the opinion that it is so sustained. The evidence warranted the finding that the libellant desired that on the night in question his wife should commit adultery, or at least that she should be placed in such a compromising position as to lead to the inference of the committal of that act; that he desired to do this so that he might get a divorce and be freed from her and his real estate be free from any claim on her part; that Mrs. Dow, who was to be away, had refused the libellee the use of the house for that evening; that the libellant knew it and feared that Dow might be at home; and that the libellant's purpose in seeing Dow was to induce him to stay away, not only that a crime, if committed, might be detected, but that it might be committed; and that in that way, by active exertion, he aided in procuring the house for an adulterous use by his wife, when otherwise she would not have had it. In other words, the evidence warranted the finding made by the judge that the libellant arranged with Dow that the house should be used by his wife without interference or interruption on the part of other persons, although such permission had been refused by Mrs. Dow. Under the circumstances of the case this must be held to be a finding that the libellant did this to facilitate the committal of adultery by his wife.

Was such an act as matter of law connivance on the part of the libellant? The law upon this subject was quite fully considered by this court in Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237, Morton, J., speaking for the court, uses the following language: "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact.[43] He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce (5th Ed.) § 9; Timmings v. Timmings, 3 Hagg. Eccl. 76; Stone v. Stone, 1 Rob. Eccl. 99, 101; Phillips v. Phillips, 10 Jur. 829."

Applying the law to the findings of the court as interpreted by the issues on trial, it is clear that the ruling that as matter of law the facts show connivance was correct. By his arrangement with Dow the libellant assisted his wife on "her path to the adulterous bed." It is immaterial that she was unaware of this assistance. As additional cases bearing upon the law of connivance, see Morrison v. Morrison, 136 Mass. 310; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

Exceptions overruled.[44]

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[43] Accord: Reiersen v. Reiersen, 32 App. Div. 62, 52 N. Y. Supp. 509 (1898); Warn v. Warn, 59 N. J. Eq. 642, 45 Atl. 916 (1899); Brown v. Brown, 62 N. J. Eq. 29, 49 Atl. 589 (1901), reversed on the evidence in 63 N. J. Eq. 348, 50 Atl. 608 (1901); Tuck v. Tuck, 117 App. Div. 421, 102 N. Y. Supp. 688 (1907).

[44] Accord: Karger v. Karger, 19 Misc. Rep. 236, 44 N. Y. Supp. 219 (1897); May v. May, 108 Iowa, 1, 78 N. W. 703, 75 Am. St. Rep. 202 (1899); Torlotting v. Torlotting, 82 Mo. App. 192 (1899). So, also, a husband cannot obtain a divorce for the wife's adultery, where he deserted her in a large city, with but a trifling sum to provide for her wants. Heidrick v. Heidrick, 22 Pa. Super. Ct. 72 (1902). And see Moore v. Moore, 102 Tenn. 148, 52 S. W. 778 (1899). In Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95 (1896), where the wife directed her attorneys to employ detectives to procure evidence, and the detectives hired a lewd woman to lure the husband into an act of adultery, the wife's suit was held to be barred on the ground of connivance, even though she may not have expressly directed employment of the woman. See, also, to same effect, Gower v. Gower, L. R. 2 Prob. & Div. 428 (1872). In Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424 (1886), and Lovering v. Lovering, 3 Hagg. Ecc. 85 (1792), it was held that a husband who connives at one act of adultery can not object to a subsequent act. Contra: Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187 (1903). But connivance at one act of adultery will not bar divorce for an earlier act. Millard v. Millard, 78 Law Times (N. S.) 471 (1898); Viertel v. Viertel, supra; Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1892); Morrison v. Morrison, 142 Mass. 361, 365, 8 N. E. 59, 56 Am. Rep. 688 (1886). The latter case, however, says that the character of this connivance may be so open and revolting as to indicate that the husband is not injured even by a prior act not expressly consented to.

(C) Condonation

SHACKLETON v. SHACKLETON.

(Court of Chancery of New Jersey, 1891. 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478.)

VAN FLEET, V. C. This is a suit by a wife against her husband for divorce. The charge is adultery. The husband's guilt is proved. There is no difficulty on that score, but the case nevertheless presents a debatable question, and that is, whether all the wrongs on which the complainant's right of action rests have not been pardoned?

The parties were married in August, 1867. They have five children. They all live with their mother. The proofs show that the defendant induced another woman, by falsely representing himself to be a single man, to enter into a contract of marriage with him, in November, 1881, and that he and she, from that date on until April, 1889, lived together as husband and wife. During the same period the defendant also lived with the complainant as his wife. He, however, spent the greater part of his time with the other woman. His adulterous intercourse with her extended over a period of more than seven years. In April, 1889, this other woman brought a suit for divorce against the defendant, for adultery, in the superior court of the city of New York. He was then a citizen of this state, and notice of that suit was given to him by publication in a New York newspaper. The complainant saw that publication soon after it was made, and she admits that it led her to suppose that the defendant had lived with this woman as his wife. She did not see the defendant, after the publication came to her knowledge, until the 29th day of May following. She then accused him with having committed adultery with this woman. He assured, her, with great earnestness, that the charge was false, and told her that if she would go with him to his lawyer and to one of his employers, he could satisfy her of his innocence. She says she told him that she believed him to be guilty, notwithstanding his protestations of innocence, and also that she would never forgive him. She admits that the truth is that she believed he was guilty in spite of his denials. And she frankly confesses that she had sexual intercourse with him during the night of the day on which this conversation occurred. Her evidence shows that it was voluntary. He went to bed first, she entered the same bed shortly afterward, and there the intercourse occurred. He left her the next morning and did not return until after this suit was brought. The complainant's bill was filed June 7th, 1889. The important question which this condition of facts raises is, did the complainant, by allowing the defendant to have sexual intercourse with her, on May 29th, condone all his adulteries?

The law is settled that a wife, by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby pardons his offence. 2 Bish. Mar. & D. § 43; Quincy v. Quincy, 10 N. H. 272, 274. Such act necessarily implies forgiveness. A husband by committing adultery violates one of the most sacred duties imposed upon him by the marriage contract, and by his wrong forfeits all his rights under the contract. By his infidelity he puts it in the power of his wife to have the bond which binds her to him dissolved; it is, therefore, entirely consonant with both reason and justice that if she freely consents to sexual intercourse, after she has full knowledge of his guilt, that her consent should operate as a pardon of his wrong. But condonation in such cases is always conditional and limited; the party forgiven must, to retain the benefit of the pardon, treat the other, in the future, with conjugal kindness and fidelity; and, as a general rule, the pardon extends only to such offences as are known to the pardoning party when the intercourse occurs. With regard to the limitation of this rule, Bishop says: "Alike, in reason and in law, forgiveness cannot take place without a knowledge of the existence of the thing to be forgiven, so that such knowledge is one of the elements of every presumed condonation." 2 Bish. Mar. & D. § 38. An instructive example of the manner in which this principle is applied, is given in Alexandre v. Alexandre, L. R. 2 Pro. & Div. 146. A husband brought a suit against his wife for divorce, on the ground of adultery. The parties were married in January, 1856, and lived together for a short time thereafter and then separated, and did not resume cohabitation until March, 1868. After resuming cohabitation they remained together for only a few weeks. The husband then brought his suit. While they were separated, the wife had a child by another man—it was born in 1860—and after the birth of the child, and before they resumed cohabitation, the wife committed other adulteries. While the negotiations looking to a restoration of conjugal relations were going on, the wife confessed the adultery which resulted in the birth of the child, but concealed those subsequently committed. The question was whether the husband had not, by taking his wife back under the circumstances stated, condoned all her offences, but the court held that the offences committed subsequent to the birth of the child had not been condoned, because it could not be presumed that the husband had forgiven wrongs that he did not know had been committed.

The doctrine that the pardon implied from sexual intercourse shall extend only to offences known to the pardoning party when the intercourse occurs, is no less a dictate of sound reason than of justice. Willingness to forgive a single offence, or even a series of offences, committed under circumstances of strong temptation, would not give the least support to a presumption that the injured party, if he or she knew the whole truth, would forgive a long course of profligacy. Forgiveness may be so expressed, certainly by words, and possibly also by conduct without words, as to show that the injured party means to blot out the whole past and to forgive everything, both offences known and unknown, but in no case should the court so adjudge, as against an injured wife, except the proofs show very clearly that such was her purpose. The question whether a matrimonial offence has been condoned or not, is always one of intention, and where a wife is the injured party, and her husband claims the benefit of a pardon, and rests his claim on nothing but an implication arising out of her conduct, the court should be extremely careful not to absolve him from the consequences of a wrong which his wife never intended to forgive. It must be remembered that she is the weaker party, and always more or less under the influence of her husband, and that in many cases her chief means of inducing her husband to perform his duties toward her cheerfully and generously, is by yielding to his wishes and trying to please him. A prudent wife, unless her husband is a craven, will always coax rather than attempt to coerce him.

The rule that pardon may be implied from sexual intercourse, is not enforced so rigorously against a wife as it is against a husband. The reasons why this is so are obvious. They were stated by Lord Stowell as follows: "A woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her (D'Aguilar v. D'Aguilar, 3 Eng. Eccl. Rep. 329, 337); she is more sub potestate, more inops consilii; she may entertain more hopes of the recovery, and reform of her husband; her honor is less injured and is more easily healed. * * * It is not improper that she should for a time show a patient forbearance. * * * Weakness in her is pardonable in many circumstances." Beeby v. Beeby, 3 Eng. Eccl. Rep. 338, 340. Notwithstanding the radical changes which, during the last forty years, have been made in the law respecting the property rights of married women, the husband is still, in many respects, the ruler and his wife his subject. Her position is still one of obedience, and when she has no separate estate it is also one of dependence. That is the case here. The complainant, when the intercourse occurred which the defendant claims operated as a pardon, was entirely without means and wholly dependent on the defendant for everything.

The principles above stated must control the decision in this case. And they make it clear, as I think, that the complainant is entitled to a decree. The legal effect of the sexual intercourse which she had with the defendant on May 29th was to condone only such offences as she then knew he had committed. She did not then know that he had committed adultery. She says, it is true, that she believed he had, but her belief, it is manifest, was the product of suspicion and not of evidence. Nothing up to that time had come to her knowledge, so far as the evidence shows, which was sufficient to have induced a loyal wife to believe that her husband had committed adultery. All she had heard up to that time was what the newspaper had told her. That was sufficient, undoubtedly, to excite her fears and create suspicion, but it was not evidence, nor even such information as should have induced her to start at once, and before she had given her husband an opportunity to defend himself, in pursuit of information against him. It is the duty of a wife to be loyal to her husband; she must cling to him closer in adversity than in prosperity; believe in him when others doubt; stand by him when every other friend deserts him; defend him against all assailants; and she must be the last person to believe a report tending to disgrace or dishonor him. Knowledge of what the newspaper disclosed did not, in my judgment, impose upon the complainant the duty of going at once in search of evidence against her husband, and so making her chargeable with all the knowledge that she might thus have acquired; on the contrary, I think it was her duty to desist from inquiry until she had given him an opportunity to defend himself. That was the course she pursued.

The fact is, that when the complainant had the intercourse with the defendant, which he now attempts to use as a shield against the consequences of a life of profligacy extending over more than seven years, she could not prove that he had committed a single act of adultery; much less did she know that he had made the same solemn vows of love and loyalty to another woman that he had made to her. She had heard enough to make her suspect that he had been unfaithful to her, but it is entirely certain that she did not know either the extent or the atrocious character of his misconduct. To impute such knowledge to her by presumption would, as it seems to me, be contrary to the lowest notions of justice; the presumption should, according to both reason and justice, be the other way; for, I think there can be no doubt whatever, that had the complainant known the whole truth on May 29th—the full extent of the defendant's apostacy to her—that instead of going to the bed where he lay and submitting to his embraces, she would have fled from him as a polluted being. The fact that she brought this suit, within less than ten days after he turned his back upon her, shows that she did not submit to his embraces because she was indifferent to her rights, or insensible to injury. The complainant is entitled to a decree.

The defendant is also before the court on an order to show cause why he should not be adjudged guilty of contempt for disobeying an order requiring him to pay alimony. The proofs are not sufficient to support an order declaring that he has been guilty of willful disobedience, and the order to show cause must, therefore, be discharged.[45]

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[45] See, also, the following cases to the effect that condonation is based upon a full knowledge of the offense and that mere suspicion is not enough: Bramwell v. Bramwell, 3 Hagg. Ecc. 618 (1831); Quincy v. Quincy, 10 N. H. 272 (1839); Welch v. Welch, 50 Mo. App. 395 (1892); Gosser v. Gosser, 183

ROBBINS v. ROBBINS.

(Supreme Judicial Court of Massachusetts, 1868. 100 Mass. 150, 97 Am. Dec. 91.)

Gray, J.[46] * * * The law is settled in this Commonwealth, in accordance with the doctrine declared by Lord Stowell and Sir John Nicholl in the English ecclesiastical courts, that any condonation by the wife of her husband's cruelty is on the implied, if not expressed, condition of his treating her in the future with conjugal kindness; that any breach of this condition will revive the right to maintain a libel for the original offence; and that such a breach may be shown by acts, words or conduct which would not of themselves prove a cause of divorce. Harshness or rudeness, not sufficient to maintain a libel, may receive a different interpretation and effect upon the question of condonation, after proof that the husband has previously gone to the length of positive acts of cruelty. Gardner v. Gardner, 2 Gray, 441, 442; D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. 782; Durant v. Durant, Id. 763; Westmeath v. Westmeath, 2 Hagg. Eccl. (Suppt.) 114.

In the case before us, the testimony was that for the period of six weeks, beginning only a fortnight after the last act of extreme cruelty proved, the husband, while living in the same house with his wife, wholly and continuously refused to speak to her. Such evidence of

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Pa. 499, 38 Atl. 1014 (1898); Harris v. Harris, 83 App. Div. 123, 82 N. Y. Supp. 568 (1903). But condonation may cover unknown acts, if so intended. Moorhouse v. Moorhouse, 90 Ill. App. 401 (1900). If the wife believes her husband's denial, even though a third party would not, her subsequent conduct is not condonation. Andros v. Andros, 1 Cal. App. 309, 82 Pac. 90 (1905). See the following, also, to the effect that condonation is not so readily established against the wife as against the husband: D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773 (1794); Beeby v. Beeby, 1 Hagg. Ecc. 789 (1799); Wood v. Wood, 2 Paige (N. Y.) 108 (1830); Bowie v. Bowie, 3 Md. Ch. 51 (1850); Armstrong v. Armstrong, 32 Miss. 279 (1856); Clague v. Clague, 46 Minn. 461, 49 N. W. 198 (1891). In Rogers v. Rogers, 67 N. J. Eq. 534, 58 Atl. 822 (1904), it was held that sexual intercourse amounted to condonation, even though the offense was not forgiven. In California condonation must, by statute, be by express agreement, cohabitation alone not being sufficient. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772 (1901). Where the wife after knowledge of the offense continues to live with the husband, but denies him marital rights, there is no condonation. Mattes v. Mattes, 121 Ill. App. 400 (1905); Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876 (1907). On condonation of loathsome diseases, see Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 13 Ann. Cas. 214 (1906), reported with note in 5 L. R. A. (N. S.) 729.

[46] Both husband and wife filed libels for divorce a vinculo. Foster, J., at trial, found "that, although the conduct of the wife showed condonation on her part of the specific acts of personal violence, yet that the husband's persistent refusal to speak to her for six weeks was a violation on his part of the implied condition of future kind treatment, upon which the condonation was based, and was such misconduct as justified the wife in leaving his house, that the husband's libel must be dismissed, and that the wife was entitled to a decree." The statement of facts is omitted and only so much of the opinion is given as relates to the point of condonation.

persistent and enduring unkindness and ill temper warranted the wife or the court in inferring that his smothered anger would break out again into acts of cruelty.

Divorce granted to the wife.[47]

(D) Recrimination

CLAPP v. CLAPP.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 531.)

Chapman, J.[48] The libellant seeks to obtain a divorce from his wife on the ground that she deserted him on the 5th of April, 1860, and continued the desertion for five years and more. She proves in defence, that before the lapse of the five years, namely, on the 25th of April, 1864, the libellant married another woman, and occupied the same house and bed with her for several days. This is sufficient evidence to prove adultery on his part.

1. He replies to this evidence, that his adultery is no defence, because her offence is of a different character; and he contends that she cannot recriminate his delictum unless it is an offence of the same kind, and not of a different character. Some authorities are cited to sustain this point. But the offence of each of them was of such a character as would by our statutes entitle the other party, if not in fault, to a divorce from the bonds of matrimony. In that respect, the offences were alike. The court had occasion to consider the validity of such a defence in Hall v. Hall, 4 Allen, 39. It was there held that where a wife has deserted a husband for a period of five years, so

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[47] It is clear that a condoned offense is revived by the commission of the same kind of offense. Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298 (1898); Moorhouse v. Moorhouse, 90 Ill. App. 401 (1899), semble; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56 (1905); Harding v. Harding, 36 Colo. 106, 85 Pac. 423 (1906); Clark v. Clark, 191 Mass. 128, 77 N. E. 702 (1906); Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654 (1907). Also that a condoned offense is revived by the commission of a different offense. Copsey v. Copsey, 20 Times Law R. 728 (1904), condoned adultery revived by desertion; Fisher v. Fisher, 93 Md. 298, 48 Atl. 833 (1901), condoned adultery revived by cruelty. Likewise a condoned offense is revived by conduct which causes a reasonable apprehension of the commission of the same or a similar offense. Totten v. Totten (N. J. Ch.) 60 Atl. 1095 (1905); Apgar v. Apgar (N. J. Ch.) 59 Atl. 230 (1904); Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179 (1904); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901). It is intimated in the last-named case that nothing less will revive the condoned offense. In Brown v. Brown, 129 Ga. 246, 58 S. E. 825 (1907), it was said without discussion that condoned cruelty will be revived only by fresh acts of cruelty. In Ellithorpe v. Ellithorpe (Iowa) 100 N. W. 328 (1904), it was said that a husband could not rely on condonation of his offense, where he kept his promise of future conjugal kindness only while he slept, resuming his abuse the following day with additional meanness.

[48] Only part of the opinion is given. It sufficiently states the facts.

that he would be entitled to a divorce against her on that ground, she cannot maintain a libel against him on the ground of his adultery after the lapse of the five years; but she may maintain it if he has committed adultery within the five years and before her offence is complete. This doctrine stands on the obviously just ground stated in Hope v. Hope, 1 Swab. & Trist. 107, where it is said that "a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce any marital right." At the time when the libellant committed his offence, a locus penitentiæ remained to the wife, and she might have returned to him. His offence justified her in never returning. * * *

Libel dismissed.[49]

BAST v. BAST.

(Supreme Court of Illinois, 1876. 82 Ill. 584.)

Appeal from the Superior Court of Cook County; Hon. Samuel M. Moore, Judge, presiding.

BREESE, J. The grounds alleged for reversing the decree in this case are, that the decree is not sustained by the evidence, and that appellee himself had deserted his wife, giving to her the right to claim a divorce from him. We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminatory defense to a charge of adultery. Had appellee been guilty of a like offense, he could not claim a divorce.

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[49] See, to the effect that neither can obtain a divorce where both are guilty of the same offense, Amy v. Berard, 49 La. Ann. 897, 22 South. 48 (1897), cruelty; Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316 (1897), cruelty; Lenning v. Lenning, 73 Ill. App. 224 (1898), adultery; Shoup v. Shoup, 106 Ill. App. 167 (1903), cruelty; Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938 (1906), semble, desertion; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659 (1906), cruelty; Hartwell v. Hartwell, 25 Utah, 41, 69 Pac. 265 (1902), cruelty. The following hold that divorce should be denied, even though the offenses are different and may not be of the same grade of moral turpitude: Hugo v. Hugo, 21 Pa. Co. Ct. R. 607 (1898); Malone v. Malone, 76 Ark. 28, 88 S. W. 840 (1905); Day v. Day, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169 (1905); Cassidy v. Cassidy, 63 Cal. 352 (1883); Alexander v. Alexander, 140 Ind. 555, 38 N. E. 855 (1894). In Bohan v. Bohan (Tex. Civ. App.) 56 S. W. 959 (1900), held that, while the offense used in recrimination need not equal that of defendant, it must be of the same general character. In many states statutes declare what offenses may be used in recrimination. Stim. Am. St. Law, §§ 6202, 6217. In G. v. G., 67 N. J. Eq. 30, 56 Atl. 736 (1903), a statute declaring that, when each party is guilty of adultery, neither shall have a decree, was held not to apply to a case where plaintiff charged adultery and defendant charged impotence; hence both entitled to a decree. The following cases hold that conduct resulting from defendant's wrong can not be used by defendant in recrimination: Prather v. Prather, 99 Iowa, 393, 68 N. W. 806 (1896), wife's cruelty result of seeing husband commit an unnatural crime; Fitzpatrick v. Fitzpatrick, 21 Misc. Rep. 378, 47 N. Y. S. 737 (1897); Setzer v. Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666 (1901), husband's adultery due to fact that wife's cruelty drove him away; Constantinidi v. Constantinidi, [1903] Prob. 246, husband's adultery due in part to wife's conduct.

As to the testimony in all such cases it must generally be circumstantial. The fact of adultery is to be inferred from circumstances that naturally lead to it by a fair inference as a necessary conclusion. The direct fact of adultery can seldom, or ever, be proved. We think sufficient facts were proved in this case "to lead the minds of reasonable and just men" to the conclusion established by the verdict, and we have no disposition to disturb it.

The decree must be affirmed. Decree affirmed.[50]

CUSHMAN v. CUSHMAN.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 38, 79 N. E. 809.)

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

Libel for divorce by one Cushman against one Cushman. Judgment dismissing the libel, and libelant excepted. Exceptions sustained.

HAMMOND, J. To a libel of the wife for divorce on the ground of adultery the husband filed an answer denying the adultery and setting up by way of recrimination prior desertion on the part of the wife. At the trial the judge found that the husband was guilty of the adultery, but as to the charge of desertion he did not find that the wife's conduct amounted to desertion, although he did find "that there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel," and ordered it to be dismissed. In other words, the wife's charge of adultery was sustained but the husband's charge of desertion was not.

However it may be elsewhere, the rule in this commonwealth is that while the offense set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as in law would be of itself sufficient ground for divorce. Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Walker v. Walker, 172 Mass. 82, 51 N. E. 455, and cases there cited. If upon the evidence the judge had found desertion then, the dismissal of the libel would have been correct; but he did not find it, and there is nothing in the facts found by him as to the conduct of the wife which estopped her from a divorce on the ground of the husband's adultery. This case does not belong to the class of which Lyster v. Lyster, 111 Mass. 327, is a type, where the libelee attempts to justify the charge alleged in the libel (in that case it was desertion) by showing misconduct on the part of the libelant which, though not sufficient in law to constitute a ground of divorce may yet be sufficient in law to justify the act relied upon in the libel. Watts v. Watts, ubi supra. In the case before us a separate and distinct offense on the part of the libelee, having no relation to the offense charged, is set up as a bar to the libel. In such a case, as has been before stated, the offense set up must be sufficient of itself to constitute a ground of divorce.

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[50] Accord: Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867 (1897), semble; Abshire v. Hanks, 119 La. 425, 44 South. 186 (1907). The Illinois statute provides that, if it shall appear to the satisfaction of the court that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed. Held, under this statute, in a suit on the ground of cruelty, adultery can be used as a bar. Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 55 L. R. A. 697, 86 Am. St. Rep. 325 (1901). But see Buerfening v. Buerfening, 23 Minn. 563 (1877), where, under a similar statute, it was held that adultery can be used by way of recrimination only where the suit is on the ground of adultery.

Exceptions sustained.[51]

STORMS v. STORMS.

(Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 549, 64 Atl. 700.)

Suit by Jennie Storms against William F. Storms. On petition and cross-petition for divorce. Petition dismissed. Cross-petition granted.

EMERY, V. C.[52] * * * The petitioner being found guilty of adultery, the further question arises whether under the statute a divorce can be granted to the husband, who has himself been guilty of adultery, although this has been condoned. The language of the statute (Divorce Act, Revision 1902; P. L. p. 509, § 22) is: "If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties and done with an intention to procure a divorce (or that the complainant was consenting thereto), or that both parties have been guilty of adultery, then no divorce shall be decreed." The original divorce act of December 2, 1794 (Patterson's Laws, p. 143), contained this clause, and it has since been included as a separate clause in all of the divorce acts. The question is one of statutory construction, and is simply whether "guilty of adultery" in the act means "committed adultery," or whether it means "guilty of" or "chargeable with" adultery, under the divorce act. If an adultery be condoned, a divorce could not be granted, and therefore the party charged with such an adultery could not be found guilty of adultery within the purview of the act, although he or she might be "guilty of adultery," within the meaning of the crimes act, or in the common acceptation of the term. I think the adultery which was characterized in the statute as a guilt, and which was to be a bar to divorce, was an adultery which was a "guilt" or offense, entitling the party injured to a divorce under the act. Chancellor Zabriskie in Jones v. Jones (1866) 18 N. J. Eq. 33, 90 Am. Dec. 607, inclined to this view of the statute; but, as the proofs in that case did not establish the commission of the offense, the decision, although of great weight, cannot be considered as controlling. That adultery condoned is not in itself an absolute bar to a divorce for subsequent adultery by the other spouse is the general doctrine of the courts where there is no express statute, and the general opinion of the leading text-writers. Anichini v. Anichini, 2 Curt. Eccl. 210 (Dr. Lushington, 1839); Cumming v. Cumming (1883) 135 Mass. 386, 46 Am. Rep. 476; Fisher v. Fisher (1901) 93 Md. 298, 48 Atl. 833. A contrary view, it is said, would permit a sort of license to commit adultery without punishment to be set up on one side by guilt on the other, however distant in point of time, or however completely forgiven or condoned. In most of the states having statute provisions, the bar of adultery by the party seeking divorce is expressly confined to cases where he or she has been guilty under such circumstances as would have entitled the opposite party to a decree, and decisions under these statutes, unless they be considered declaratory of the previous rule, do not aid in the construction of our statute. Morrell v. Morrell (N. Y. 1847) 1 Barb. 318; Eikenbury v. Burns, 33 Ind. App. 69, 70 N. E. 837; Burns' Ann. St. 1901, § 1045. If, as a matter of statutory construction, the words "guilty of adultery" are held to mean guilty of adultery punishable or actionable under the act, then the court, finding the adultery not to be within the act, has no discretion as to granting a divorce, if the guilt of the other party under the statute be proved. The statute itself prescribes the rule that is to be enforced in cases where both parties are charged with adultery, and in the absence of express provision in the statute giving a discretion to the court, in cases where both parties have in fact been guilty of adultery, it should not be exercised. It is altogether a safer and sounder practice to determine such cases by a certain rule of law prescribed by statute than by a judicial discretion based on the circumstances of each case. Cumming v. Cumming, supra. The difficulties arising under the English matrimonial causes act (St. 20 & 21 Vict. c. 85, § 31), which expressly gives discretion to the court, are pointed out by Lord Penzance in Morgan v. Morgan, 1 Law Rep. Pr. & Div. 81, 38 L. J. Rep. (N. S.) Pr. & Matr. 38 (1869), and subsequent cases, and by

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[51] Accord: Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1893); Rudd v. Rudd, 66 Vt. 91, 28 Atl. 869 (1894); McCannon v. McCannon, 73 Vt. 147, 50 Atl. 799 (1901); Walker v. Walker, 172 Mass. 82, 51 N. E. 455 (1898). Contra: Deisler v. Deisler, 59 App. Div. 207, 69 N. Y. Supp. 326 (1901), semble. Fact that plaintiff in a previous suit for divorce committed perjury is no bar to his present suit. Conner v. Pozo, 114 La. 562, 38 South. 454 (1905).

[52] Only part of the opinion is given.

Sir James Hanner in McCord v. McCord, L. R. 3 Pr. & Div. 237, 44 L. J. Rep. (N. S.) 38, 30 (1875). * * *

I will advise decree dismissing the petition and for a decree on the cross-petition.[53]

IV. General Defenses

Among the general or miscellaneous defenses may be mentioned the following: Lack of competent evidence, prematurity of suit, delay in bringing suit, lack of capacity to commit offense relied on, res judicata, and absence of the marriage relation. As to evidence, see the following references: Ordinarily the uncorroborated testimony of the party charging the offense is insufficient. True v. True, 6 Minn. 458 (Gil. 315) (1861); Cummins v. Cummins, 15 N. J. Eq. 138 (1862); Kimball v. Kimball, 13 N. H. 222 (1842); Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91 (1868); Jenkins v. Jenkins, 86 Ill. 340 (1877); Potter v. Potter, 75 Iowa, 211, 39 N. W. 270 (1888); Ortman v. Ortman, 92 Mich. 172, 52 N. W. 619 (1892). But see Baker v. Baker, 195 Pa. 407, 46 Atl. 96 (1900). Nor are uncorroborated confessions of guilt ordinarily sufficient to establish marital misconduct. McCulloch v. McCulloch, 8 Blackf. (Ind.) 60 (1846); Billings v. Billings, 11 Pick. (Mass.) 461 (1831); Mathews v. Mathews, 41 Tex. 331 (1874). The testimony of a particeps criminis, while admissible, is open to grave suspicion. Wahle v. Wahle, 71 Ill. 510 (1874); Simons v. Simons, 13 Tex. 468 (1855); Lewis v. Lewis, 9 Ind. 105 (1857); Ginger v. Ginger, L. R., 1 Prob. and Div. 37 (1865). It is also held that the evidence of detectives should be received with great caution. Blake v. Blake, 70 Ill. 618 (1873); Moller v. Moller, 115 N. Y. 466, 22 N. E. 169 (1889); Van Voorhis v. Van Voorhis, 94 Mich. 60, 53 N. W. 964 (1892); Winston v. Winston, 165 N. Y. 553, 59 N. E. 273 (1901). To authorize a divorce, plaintiff must be entitled at the time suit is instituted. Tourné v. Tourné, 9 La. 452 (1836). On the statute of limitations, see Stim. Am. Stat. Law, § 6223, Even aside from statutes, long delay, unless explained, will bar suit. Hitchins v. Hitchins, 140 Ill. 326, 29 N. E. 888 (1892); Stuart v. Stuart, 47 Mich. 566, 11 N. W. 388 (1882); Barker v. Barker, 63 N. J. Eq. 593, 53 Atl. 4 (1902). But delay is no bar where plaintiff is ignorant of the ground for divorce. Clark v. Clark, 97 Mass. 331 (1867). On the effect of a previous adjudication, under various circumstances, see Thurston v. Thurston, 99 Mass. 39 (1868); Haltenhof v. Haltenhof, 44 Ill. App. 135 (1891); Wagoner v. Wagoner, 76 Md. 311, 25 Atl. 338 (1892); Miller v. Miller, 150 Mass. 111, 22 N. E. 765 (1889); Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223 (1887).

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[53] Accord: Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607 (1866); Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476 (1883); Wabeke v. Wabeke (Iowa) 98 N. W. 559 (1904); Talley v. Talley, 215 Pa. 281, 64 Atl. 523 (1906). Contra: Stiehr v. Stiehr, 145 Mich. 297, 108 N. W. 684 (1906), semble. In Fisher v. Fisher, 93 Md. 298, 48 Atl. 833 (1901), both were guilty of adultery, the wife condoned the husband's offense, but by his cruelty the adultery was revived; held, the condoned adultery, after revival, could be used in recrimination. For cases under the English statute, see Lloyd v. Lloyd, 84 Law T. 728 (1901); Hynes v. Hynes, 20 Times Law, 781 (1904); Shaw v. Shaw, 20 Times Law, 795 (1904); Roche v. Roche, [1905] Prob. 142, Squire v. Squire, [1905] Prob. 4.

V. ALIMONY

(A) Permanent

ECKER v. ECKER.

(Supreme Court of Oklahoma, 1908. 22 Okl. 873, 98 Pac. 918, 20 L. R. A. [N. S.] 421.)

Divorce by Charles L. Ecker against Della Ecker. Plaintiff had judgment for a divorce and the custody of their minor child, but it was decreed that the property should be divided equally between them, or that defendant have judgment for one-half of its value as found by the master, and from such portion of the judgment plaintiff brought error to the United States Court of Appeals of the Indian Territory, whence the cause was transferred, under the Enabling Act, to the Supreme Court of the state of Oklahoma. Reversed and remanded. * * *

HAYES, J.[54] * * * The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute.

The statute governing in this case reads: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Mansf. Dig. Ark. § 2565 (Ind. T. Ann. St. 1899, § 1853).

Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. Reavis v. Reavis, 1 Scam. (Ill.) 242; Deenis v. Deenis, 79 Ill. 74; Spitler v. Spitler, 108 Ill. 120; Edwards v. Edwards, 84 Ala. 361, 3 South. 896; McDonald v. McDonald, 117 Iowa, 307, 90 N. W. 603; Reynolds v. Reynolds, 92 Mich. 104, 52 N. W. 295; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662; Pauly v. Pauly, 14 Okla. 1, 76 Pac. 148; Bishop on Marriage, Divorce and Separation, vol. 2, p. 865; Nelson on Divorce and Separation, vol. 2, p. 907. It is, however, a discretion that a court should at all times exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances.

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[54] Part of the statement of facts and part of the opinion are omitted.

In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce. The evidence is convincing that each has been guilty of cruel treatment of the other and gross immoral conduct, consisting of adultery with different persons. The question whether, upon the evidence in the case and the findings of the master, either party should be granted a divorce, is not before us. The part of the judgment granting a divorce has not been appealed from. The sole question is whether, the divorce having been granted to plaintiff, the court should have granted alimony to defendant.

At the time defendant married plaintiff he had but little property. During their 15 or 16 years of married life, the husband, principally through the thrift, frugality, and industry of the wife, who labored on the farm, and conducted, at different times, a boarding house, restaurants, and kept books in a grocery store, had accumulated property of the value of about $5,000. It is not clear from the record that the beginning of defendant's wrongdoing was not caused by plaintiff's cruel treatment. She is now past the meridian of her life, the greater portion of which she has spent in faithfully laboring in the discharge of her domestic duties and in contributing materially to plaintiff's accumulation of his property. Under these circumstances it is within the discretionary power of the trial court, upon granting to plaintiff a divorce, to allow defendant such alimony as under the circumstances is reasonable, just, and right, taking into consideration the amount of plaintiff's property, the extent to which defendant contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past. But the court ordered an equal division of the property, or that defendant have judgment for one-half of the value of the same. This was error.

Section 2568, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 1856), authorizes the court upon rendering final judgment for divorce, to restore each party to all property, not disposed of at the commencement of the action, which either party obtained from or through the other or in consideration or by reason of their marriage. But none of plaintiff's property was obtained by him from or through his wife during their marriage or in consideration thereof. All the property he has is property which he had at the time of his marriage, consisting of one farm, on the purchase price of which he had paid the sum of $400, and on which there was a balance due of $800, and of a small amount of personal property, or that he acquired since their marriage with their joint earnings. Whether courts, under statutes the same or similar to the section quoted above, have authority to decree a gross sum for alimony and maintenance of the wife is a question upon which the courts have divided, but it will serve no useful purpose to review here the two lines of authorities. The Supreme Court of Arkansas, prior to the adoption of this statute in the Indian Territory, had held in Brown v. Brown, 38 Ark. 324, that the court is without authority to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony, but may decree alimony in a continuous allotment of sums, payable at regular intervals. That case is controlling in the case at bar.

The judgment of the trial court is therefore reversed, and the case remanded, for further proceedings in accordance with this opinion. All the Justices concur.[55]

SAMPSON v. SAMPSON.

(Supreme Court of Rhode Island, 1889. 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349.)

Petition to modify a decree for alimony.

Per Curiam. The parties to this petition were formerly husband and wife, but at the March term of this court, A. D. 1885, the respondent on her petition was divorced from the petitioner, and decreed to have a separate support or alimony in the sum of thirty dollars per month, payable in cash monthly by the petitioner. The petition prays for relief by having said order vacated or modified as his circumstances require, alleging that since his divorce he has been married again, and has become subject to expenses which make it difficult if not impossible for him to obey the order.

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[55] See note to the principal case in 20 L. R. A. (N. S.) 421, collecting cases on the right of the wife to permanent alimony, where divorce is granted the husband for her fault. In some states the statutes expressly provide that alimony should be granted only when divorce is decreed for adultery or other fault of the husband. See Stim. on Am. St. Law, § 6261. In many states also statutes expressly govern the maximum amount, or provide that the amount shall be left to the discretion of the court (or jury), and a few provide that alimony may be granted only in gross. See Stim. Am. St. Law, § 6262. But if the legislature has conferred jurisdiction for divorce, the courts will decree alimony in conformity with the principles of ecclesiastical law, even where the statute is silent as to alimony. McGee v. McGee, 10 Ga. 477 (1851); Goldsmith v. Goldsmith, 6 Mich. 285 (1859); Chaires v. Chaires, 10 Fla. 308 (1863); Le Barron v. Le Barron, 35 Vt. 365 (1862). Contra: Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389 (1894); Wilson v. Wilson, 19 N. C. 377 (1837); Sanford v. Sanford, 2 R. I. 64 (1851). See the following cases for discussion of the various elements to be considered in fixing the amount of alimony: Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908 (1903), in general; Heninger v. Heninger, 90 Va. 271, 18 S. E. 193 (1893), income from land as opposed to selling price; Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717 (1898), income; Holmes v. Holmes, 29 N. J. Eq. 9 (1878), business capability; Hedrick v. Hedrick, 128 Ind. 522, 26 N. E. 768 (1891), effect of wife contributing to accumulation of property, and custody of children; Mussing v. Mussing, 104 Ill. 126 (1882), nature of husband's offense, etc.; Cottrell v. Cottrell, 74 S. W. 227, 24 Ky. Law Rep. 2417 (1903), when no alimony should be granted; Muir v. Muir, 133 Ky. 125, 92 S. W. 314 (1906), with note in 4 L. R. A. (N. S.) 909, on husband's prospects as basis for alimony. On the right of the husband to alimony, see note to Groth v. Groth, post, p. 165.

In Sammis v. Medbury, 14 R. I. 214, this court decided that a decree for alimony in case of a divorce a vinculo, made without reserve, is final, and cannot be changed after the expiration of the term or the time within which a new trial may be had. In that case the wife had obtained the divorce, and the decree for alimony awarded to her one-half of the rents of her husband's realty for life and one-half of his personalty, and the court decided, on his petition for a reduction presented several years afterwards, that it had no jurisdiction to grant the petition.

The decision is conclusive of the petition here, unless it can be distinguished in that the decree here is for monthly payments. The petitioner contends that the decree for alimony in such form is not authorized by the statute (Pub. St. R. I. c. 167, § 9),[56] but that under said section the court can award alimony only out of the real and personal estate which the respondent has at the time the divorce is granted. The provision has been the same at least since the Digest of 1798. It has long been the practice of the court to award alimony in the form in which it was awarded to the respondent. Several revisions of the statutes have been made since the practice has existed, and it must be presumed that the construction that has practically been given to the statute met the approval of the General Assembly, or the statute would have been changed. It is too late now to question the correctness of the construction.

Doubtless the court supposed that the words, "out of the real or personal estate of the husband or out of both," contained in said § 9, did not mean simply out of the property which the husband had when the divorce was granted, but would extend to other property subsequently acquired by him.. Some such construction was necessary as a matter of the simplest justice, for otherwise a man with no present property would not be subject to alimony though he might be earning thousands of dollars every year in his business or profession.

We do not think that the fact that the alimony is awarded by allowances from month to month constitutes a distinction which would entitle us to reduce the alimony, no power to modify the award being reserved in the decree.

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[56] § 9 reads as follows: "In such case the wife shall also be allowed, out of the real or personal estate of the husband or out of both, such alimony as the court shall think reasonable, not exceeding the use of one moiety of his real estate during the life of the wife, and the property of one half of his personal estate, having regard to the personal property which came to the husband by the marriage and his ability."

Of course, if the petitioner is unable to pay the monthly allowances, that is a matter which may be considered when the respondent calls upon the court to enforce payment of them.

Petition dismissed.[57]

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[57] See Brown v. Brown, 31 Wash. 397, 72 Pac. 86 (1903), reported in 62 L. R. A. 974, with an extended note on the effect of a second marriage of either party upon the obligation to pay alimony. And see Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494 (1905), with note in 3 L. R. A. (N. S.) 923, on the effect of a reconciliation and remarriage of the divorced parties.

"In 1892 the plaintiff obtained a decree of absolute divorce and annual alimony from the defendant. A statute passed in 1900 provides that the courts may subsequently vary decrees awarding alimony, 'whether heretofore or hereafter rendered.' N. Y. Laws, 1900, c. 742. In 1902 the defendant sought a reduction in the amount. Held, that in so far as the statute is retroactive it violates the constitutional provision against depriving a person of property without due process of law. Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903).

"In a decree for separation the basis of the right to permanent alimony is only the common-law right of the wife to support, for the decree does not terminate the marriage relation and the incidental property rights are not affected. Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460 (1885). Hence in the ecclesiastical courts the amount might be varied as the circumstances of the parties required. Cox v. Cox, 3 Add. 276 (1826). See De Blaquiere v. De Blaquiere, 3 Hagg. Ecc. 322, 329 (1830). Such a claim to alimony would not seem to constitute a vested right. Absolute divorce, on the other hand, and the rights incidental to it are purely statutory. See 1 Bl. Com. 441; 2 Bishop, Mar., Div. & Sep. § 1039. As it terminates the marriage relation the property rights incidental to that relation are entirely destroyed. Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505 (1884). Hence in this case the basis of the decree for permanent alimony is the loss of these property rights as well as the right to support. Calame v. Calame, 24 N. J. Eq. 440 (1874). Such a decree, like ordinary judgments, cannot subsequently be varied by the court unless at the time of divorce this power is conferred by statute or reserved in the final decree. Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898); Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70 (1894). In the principal case, accordingly, it would seem that the wife's interest was vested, and therefore not subject to subsequent statutory restriction." Note in 16 Harv. Law Rev. 521.

On the right to alimony where a marriage is annulled, see Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900 (1908), and note in 22 Harv. Law Rev. 307. On the effect of the husband's death upon a decree for alimony, see Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 108 Am. St. Rep. 820 (1905), reported with an extended note in 2 L. R. A. (N. S.) 232. Whether imprisonment for failure to pay alimony is a violation of the constitutional provision against imprisonment for debt, see Ex parte Davis, 101 Tex. 607, 111 S. W. 394 (1908), with note in 17 L. R. A. (N. S.) 1140. And see note in 11 Harv. Law Rev. 552.

(B) Temporary

WESTERFIELD v. WESTERFIELD.

(Court of Chancery of New Jersey, 1882. 36 N. J. Eq. 195.)

On petition, depositions and master's report.

VAN FLEET, V. C.[58] The bill in this case is filed for maintenance, under the twentieth section of the statute concerning divorces. The complainant is now before the court asking for alimony pendente lite, and counsel fees. * * *

An application for alimony pendente lite stands now solely on the ground of necessity. Originally such allowances were made, in divorce suits, almost as a matter of course. At common law, by the marriage contract, the husband acquired complete control over all property owned by his wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife, and to furnish her with the means of prosecuting her suit or defending his, she would be left, during the litigation, both destitute and defenceless. She was, therefore in almost all cases regarded as a privileged suitor, who had a right to call upon her adversary for both support and the means required to carry on the litigation on her part. * * *

The doctrine that a wife is not now of right, and independent of the fact that she has a sufficient separate estate, entitled to temporary alimony, is as well supported by authority as it is by reason. Chancellor Williamson, in Marker v. Marker, 11 N. J. Eq. 256, after stating the general rule that in actions for divorce the wife is a privileged suitor and entitled to counsel fees and alimony, says: "The rule originally rested upon the principle that the husband having by the marriage contract the control of the wife's property, she was destitute of the means of her own protection. The statute has changed the common law, and secures to the wife the ownership and disposition of property she may have at her marriage or may acquire afterwards. When the wife is a suitor in court, the question will be, whether she has property independent of her husband, and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the husband and wife." Mr. Bishop, in the second volume of his treatise on Marriage and Divorce, at section 394, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either." And Judge Rapallo, in delivering the judgment of the court of appeals of New York, in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. * * * The fact that a wife is destitute of means to carry on her suit and to support herself during its pendency, is as essential as any other fact, to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity." Collins v. Collins, 80 N. Y. 1.

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[58] The opinion is slightly abridged.

It is plain, I think, if the rule just stated is applied, that this application must be denied. The wife has nearly three times the income her husband has. Her income is quite sufficient to afford her a comfortable support, and also to pay such legal expenses as it will be necessary for her to incur in the prosecution of her suit. There is, therefore, no necessity whatever that she should have additional aid. * * * The application must be denied.[59]

GROTH v. GROTH.

(Appellate Court of Illinois, 1896. 69 Ill. App. 68.)

GARY, J. The appellant filed a bill to obtain a divorce from the appellee. The court ordered that she should pay him $20 per month, temporary alimony, and $25 solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessaries, but there was no reciprocal duty.

The statute gives her—not him—alimony. To give it to him is not to administer existing, but to make new, law. Somers v. Somers, 39 Kan. 132, 17 Pac. 841; Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560. The order is reversed.[60]

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[59] See 2 Bishop, Mar., Div. & Sep. §§ 930, 931, and in general, on temporary alimony, §§ 907–965.

[60] The decision in the Circuit Court is reported in 7 Chicago Law Journal, 360. The court laid stress on the Illinois statute, making a married woman equally liable with her husband for necessaries furnished to the family, provided she has a separate estate. That alimony is limited to the wife has been generally assumed by definition of the term. See accord: Somers v. Somers, 39 Kan. 132, 17 Pac. 841 (1888). On the right of a husband to recover back property held by his wife, in connection with a suit for divorce, see note to Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 59 Am. St. Rep. 560 (1896), in 34 L. R. A. 110, and note in 25 Harv. Law Rev. 556 (1912), discussing Hagert v. Hagert (N. D.) 133 N. W. 1035 (1911). In Hagert v. Hagert, supra, the husband obtained a decree for support, under a statute requiring the wife to support the husband out of her separate property where he is unable, by reason of infirmity, to support himself. No remedy was named by the statute. Held, that the practice should be in analogy to proceedings for alimony in a suit for divorce. The court did not seem to regard the statute as necessary to its decision.

VROOM v. MARSH.

(Court of Chancery of New Jersey, 1878. 29 N. J. Eq. 15.)

Bill for decree annulling marriage. On petition for temporary alimony and counsel fee.

The Chancellor. This is an application for alimony pendente lite and counsel fee. The complainant files his bill for a decree annulling the marriage between him and the defendant. He, of course, admits a marriage de facto. He alleges that he was compelled, by duress, to enter into the contract. The fact that he is before this court denying the validity of the marriage, and in this proceeding seeking to annul it, is not, of itself, enough to relieve him from the support of the defendant pendente lite; for, as before stated, he admits that there was a de facto marriage, which is still subsisting. North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. The defendant, by her answer, denies any participation in, or knowledge of, the alleged duress, or of the existence of it; but declares that she understood at the time that the marriage was wholly voluntary on the part of the complainant. There will be an allowance of five dollars a week for ad interim alimony, with a counsel fee of one hundred dollars.[61]

(C) Alimony Unconnected with Divorce

1 Bish. Mar., Sep. & Div. § 1388: "By the English doctrine, followed in most of our states, alimony has no independent existence. Only as an appendage to some other proceeding—as, commonly, for a divorce—is it known in any department of the unwritten law; no court, not even the ecclesiastical, being authorized to grant it when it is the only relief sought." From § 1393: "Wisely and well our judiciary has unanimously decided, after thinking, that the mere nonexistence of ecclesiastical courts with us does not empower our equity tribunals to take up and exercise their divorce jurisdiction. Yet the rejected doctrine that it does, changed in a way to deprive it even of the semblance of reason, happens to have been long ago put forth by somebody as law, whereupon numbers of our tribunals adopted and are now following it, namely, that, because we have no ecclesiastical courts, our equity tribunals may take their jurisdiction to grant, not divorce, but alimony, in oblivion of the fatal truth that those courts never had or claimed the authority to award alimony, except as an incident to the divorce which admittedly is not within the jurisdiction of equity." See, to the same effect, Pom. Eq. Jur. (3d Ed.) § 1120. See note in 21 L. R. A. 677 (1893), on suit for alimony after decree of divorce; note to Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 111 Am. St. Rep. 746, 5 Ann. Cas.

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[61] On the right to alimony, where the husband denies the marriage, see Bish. Mar., Div. & Sep. §§ 922–928, and notes in 13 Harv. Law Rev. 224, and 19 Harv. Law Rev. 385. Whether the wife, who has been divorced without alimony, is entitled to temporary alimony in an independent suit to have the divorce set aside for fraud, see Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 135 Am. St. Rep. 1033, 19 Ann. Cas. 453 (1909), reported with note in 24 L. R. A. (N. S.) 1015.

378 (1905), in 3 L. R. A. (N. S.) 192, on allowance of alimony in suits to annul the marriage, and note in 25 Harv. Law Rev. 391 (1912). But in many states statutes provide for alimony unconnected with divorce. Stim. Am. Stat. Law, §§ 6351, 6154, 6280, 6311.

VI. Effect of Divorce

KENT v. McCANN.

(Appellate Court of Illinois, 1893. 52 Ill. App. 305.)

The opinion states the case.

Boggs, P. J.[62] Delia McCann, the appellee, and Patrick McCann, intermarried February 15, 1871.

They were divorced by a decree of the Circuit Court of Champaign County, Illinois, March 15, 1882, on the petition of the wife, for the fault and wrong of the husband, the specific ground being that he had been guilty of acts of extreme and repeated cruelty to the wife. Neither of the parties afterward remarried. Patrick McCann died November 16, 1890, testate. His will disposed of his property, real and personal, without reference to the appellee. The appellant, Thomas Kent, was appointed administrator with the will annexed, of the estate. This was a bill in chancery filed by Delia McCann against the heirs, devisees and legatees of the testator and also against the appellant as administrator.

The prayer of the bill is that dower be assigned the appellee in the lands of which the deceased died seized, and for a decree awarding her one-third of the personal estate after the payment of debts and costs of administration. The Circuit Court awarded the relief prayed for and by this appeal the administrator questions the correctness of so much of the decree as directs the payment to the appellee of one-third of the personalty.

The decree of divorce was a vinculo matrimonii. No other divorce is authorized by our statute. Clarke v. Lott, 11 Ill. 105. At the common law a decree a vinculo matrimonii absolutely dissolved all marriage ties and destroyed the relation of husband and wife. 5 Amer. & Eng. Ency. of Law, page 839.

Such a divorce terminated at the common law the right of the wife to dower, because it was essential to dower that the marriage should subsist at the death of the husband. Scribner on Dower, vol. 2, c. 19, §§ 1, 2 and 13; Cord, Rights of Married Women, vol. 1, § 488, h.

This rule of the common law has, however, been modified in our state by the enactment of § 14, c. 41, R. S., entitled "Dower," which is as follows: "If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage was void from the beginning, he or she shall not thereby lose dower, nor the benefit of any jointure; but if such divorce shall be for his or her fault or misconduct, such dower or jointure, and any estate granted by the laws of this state in the real and personal estate of the other, shall be forfeited." The effect of this enactment is to preserve to the wife her right to dower in case she is granted a divorce from the husband for his fault.

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[62] The opinion is abridged.

The appellee was divorced for the fault of her husband and is entitled to the benefit of the change effected by the statute, which is that she did not by the divorce lose her right to dower. * * * Counsel for appellee, however, insist that the law in Illinois is that "whatever a surviving wife takes of the estate of the husband, she takes as dower, and not as heir or next of kin."

It is not necessary that we discuss that proposition for the reason that the appellee was not the surviving wife of Patrick McCann, the deceased. After the decree of divorce Patrick McCann had no wife, and the appellee had no husband, nor could the survivor be regarded as the widow or widower of the other. Jordan v. Clark, 81 Ill. 465; Bishop on Marriage and Divorce, vol. 2, §§ 1628 and 1629; 5 Amer. and Eng. Ency. of Law, 839, and cases cited, note 1, page 840. She never became his widow, and therefore did not become entitled to rights which the statutes give to a widow. Bishop on Marriage and Divorce, supra, and many cited in note 1 to § 1628.

After the divorce she had no interest in his personal property as his wife, because she was not his wife, but they to all legal intents, as to such property, were as strangers; each being free to lawfully contract new marriage relations and become husband or wife to other parties. The statute preserved to her dower in such lands as he was seized of during coverture with her, but aside from this all other interest in his property terminated with and was destroyed by the divorce, together with the relation of husband and wife. * * *

We are clearly of the opinion that with the dissolution of the marriage tie appellee lost all interest in the property then owned by him who had been her husband, and in all property he might thereafter acquire, except that by force of the statute she retained a dower interest in such lands as belonged to him during the existence of the marriage.

Not being the widow of the deceased she was not entitled to a decree against the appellant, Kent, as his administrator, for the share in the personal estate of the deceased, which the law vested only in his widow.

The decree must be, and as to the appellant, Kent, administrator, is, reversed.[63]

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[63] See, also, In re Estate of Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717 (1886); Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392 (1890), reported in 11 L. R. A. 790, with note on the effect of absolute divorce on the rights of husband and wife. Compare Overhiser v. Mutual Life Insur-

SECTION 2.—LEGISLATIVE DIVORCE

Legislative divorces, being entirely distinct from judicial divorces, are here referred to; but, since they involve wholly questions of constitutional law, and are fully discussed in courses in constitutional law, it has been thought best not to report the cases here. Although their validity was established by the weight of authority (Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 [1888]) they have diminished in public favor and many state constitutions now prohibit them. Stim. Am. Stat. Law, §§ 395, 430. See Maynard v. Hill, in Hall's Cases on Constitutional Law in the American Casebook Series, p. —, and Jones v. Jones, 95 Ala. 443, 11 South. 11 (1892), reported in 18 L. R. A. 95, with a note on the validity of legislative divorce.

SECTION 3.—SEPARATION AGREEMENTS

COLLINS v. COLLINS.

(Supreme Court of North Carolina, 1867. 62 N. C. 153, 93 Am. Dec. 606.)

Reade, J.[64] It is to be considered for the first time, whether a deed of separation between husband and wife, will be enforced in this court.

The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics—its oneness—"they shall be no longer twain but one flesh," "to live together after God's holy ordinance," "so long as they both shall live." But little legislation is necessary to define and regulate it. We know it by intuition. It is induced by the strongest passion of the human soul, love. It is the most endeared relation which nature makes, or society forms. When lusts entice, or wealth prompts the relation, it may

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ance Co., 63 Ohio St. 77, 57 N. E. 965, 81 Am. St. Rep. 612 (1900), reported in 50 L. R. A. 552, with note on divorce as affecting wife's right to insurance upon her husband's life; In re Estate of Jones, 211 Pa. 364, 60 Atl. 915, 107 Am. St. Rep. 581, 3 Ann. Cas. 221 (1905), reported in 69 L. R. A. 940, with note on effect of divorce to revoke gift by will. For statutes on the effect of divorce, see Stim. Am. Stat. Law, §§ 6240–6254, 6300–6310.

[64] This was a petition for dower, stating death of the husband of petitioner, seisin of the land described, that husband and wife had lived apart, after signing articles of separation, by which the wife agreed to accept a certain sum secured by bond in lieu of dower. The defendant filed a general demurrer, and the case was transferred to this court by consent. The statement of facts is omitted and the opinion is slightly abridged.

prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in perfect freedom. There are no constraints of parents, of custom or of laws; nor any influences but such as are conducive to its happiness. It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven; their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but, together—the nursery of morality and piety; and the bulwarks of society.

How different from this is marriage, quarrel, separation!—the anomalous condition of a husband without a wife, a wife without a husband, parents without children, and children without parents! Such relations too surely follow deeds of separation. Let it be understood that marriage is only an experiment, to be formed inconsiderately, and broken capriciously; to be put on and off like a garment; that husband and wife may have separate establishments, in which to nurse their hate, and cover their irregularities; that children may be trained to hate one parent or both, and to have the care of neither; and society to have constantly in view the nuisance of their infidelities; and what greater evil can be imagined.

It is to be admitted, that in some of the old governments, passions and vices have fixed this evil upon society. It was unknown to the common law. Roper, in his treatise on Husband and Wife (2d vol. p. 267), says: "This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated, that, as in the other innovations upon that law, so in this instance, the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities. According to the original policy of England, the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties, by voluntary compact, to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in courts of law and equity, that a separation in pais is in effect valid, and that while it continues, the wife is to be considered, in most respects, as a feme sole."

Since this evil has attached to English society, learned Judges have strongly condemned it; but too much property now depends upon it to disturb it. * * *

If there were any doubt as to our policy it would seem to be clearly settled by our legislation. Important as the relation is, our whole legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble except for impotency at the time of marriage, or subsequent infidelity. It allows separation only where the wife's condition is intolerable, or life burdensome. And it allows separate support only where the husband is a drunkard or spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases the parties are not allowed to be the judges; but they must make application to court, and so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being freed and separated from each other—observe, separated from each other.

In contravention of this policy, and in disregard of their marriage vows, the parties in this case had "difficulties" and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them, and each relinquished to the other all the marriage privileges and responsibilities, and were to live separately. Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice. It is true that the courts will not compel them to live together; but it is equally true that they will afford them no encouragement to separate, except in those cases provided by law.

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one, to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties toward a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.

We do not know the facts of this case, except that it seems that the wife was induced to take less than she is now satisfied with, or than the law allows her.

We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court.

The demurrer is overruled with costs.

Per Curiam. Demurrer overruled.[65]

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[65] But see Sparks v. Sparks, 94 N. C. 527 (1886). In Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554 (1901), a separation agreement was held void as contrary to public policy. See case for an extended discussion of the English and American authorities. See, also, an article entitled "Separation Agreements under English Law," by R. J. Peaslee, in 15 Harv. Law Rev. 638.

COMMONWEALTH v. RICHARDS.

(Supreme Court of Pennsylvania, 1890. 131 Pa. 209, 18 Atl. 1007.)

CLARK, J.[66] This is a proceeding under the act of April 13, 1867 (P. L. 78), brought by Emma Richards against her husband, Thomas Richards, to obtain an order upon him for her maintenance and support. The complaint is that on September 20, 1887, the defendant, residing in Allegheny City, "did then and there, without any cause or provocation, desert and abandon" his wife and since that day "has failed and refused to provide anything toward her support and maintenance." At the trial in the Quarter Sessions the defendant offered in evidence a deed of voluntary separation dated March 11, 1886, by the terms of which the parties, "in view of divers disputes and unhappy differences" which had arisen between them, had consented and agreed to live separate and apart from each other during their natural lives, etc. The husband agreed to, and actually did, place in the hands of his wife, "towards her better support and maintenance," the sum of $50 in cash, household goods to the amount of $100, and four shares of stock in the Co-operative Foundry of Beaver Falls, Pa., of the par value of $100 each. In consideration thereof the wife agreed to discharge the said Thomas Richards, his heirs and assigns, and his estate, from all claims, etc.; the husband to have the custody of their child, William Emmett, etc. The question as to the effect of these articles of separation is brought upon the record by a formal bill of exceptions, and, as no question is raised as to the disposition of the case on a certiorari, we will consider it as the parties have presented it.

That a valid agreement may be made for separation between a husband and wife, and for an allowance for her support, where the separation is inevitable and immediate, is now too well settled to admit of discussion or require a citation of authorities. The validity of such covenants, although exceptional in their status, has been established by repeated decisions of this court. Ordinarily these agreements, as in Dillinger's Appeal, 35 Pa. 357, have been carried into effect through the medium of a trustee; but the undoubted weight of authority is that there may be a valid agreement for the separation directly between husband and wife, without the intervention of a trustee, which the courts will sanction. Hutton v. Hutton, 3 Pa. 100; Smith v. Knowles, 2 Grant, Cas. 413; Hitner's Appeal, 54 Pa. 110; Garver v. Miller, 16 Ohio St. 527; Randall v. Randall, 37 Mich. 563; Dutton v. Dutton, 30 Ind. 452. In such cases the husband himself will be treated as a trustee for the specific purpose in view, and will be held accordingly. If the object of the agreement is actual and immediate, if the terms are reasonable, and it is actually carried into effect by both parties in good faith, it will be as binding upon the wife as upon her husband.

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[66] Only the opinion is given. It sufficiently states the facts.

In the case at bar, we do not understand that there is any allegation of fraud or unfairness, or that the terms of the deed of separation were, in any respect, unreasonable. How, then, under such circumstances, can the husband, upon the complaint of the wife, be convicted of a crime in failing to do what he was under no legal obligation to do? Can his wife, after having by a formal deed bound him to permit her to live separate and alone, and absolved him from her maintenance, immediately thereafter enter a criminal complaint, and procure his arrest and conviction, for doing what she had bound him both in law and in equity to do? The proceedings are not under the act of 1836, but under the act of 1867; they are instituted by the wife, not by the children or by the overseers of the poor; and it is difficult to see how the wife, in such case, could at the same time hold her husband to perform the articles, and convict him of a crime for doing so. The absurdity of such a result is apparent. If the prosecution were in behalf of the children, or by the overseers of the poor, a question would be presented which it is not necessary now to discuss. Certainly a husband, as between himself and his wife, cannot be said to have separated himself from her without reasonable cause, when she has by deed placed him under legal obligation "not to visit her, or to enter any house where she may happen to be," and "to permit her to live separate from him," and to carry on business on her own account as if she were a feme sole.

If a proper provision has been made for a wife, her husband is not liable even for necessaries furnished for her support. Cany v. Patton, 2 Ashm. 140; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297. And a party dealing with a married woman, known to be living apart from her husband, is put upon inquiry as to the cause of the separation. If this be so, for much stronger reasons will the husband, under such circumstances, be relieved from a criminal prosecution, instituted by the wife herself, to obtain an order for her maintenance.

If the deed of separation was fraudulently procured and the terms were unreasonable, or if after its execution it had become null and void by the acts of the parties, these facts should have been shown; but, standing upon the deed alone, the conviction was unwarranted by the proofs, and must be set aside.

The judgment is therefore reversed, and a procedendo awarded.

ASPINWALL v. ASPINWALL.

(Court of Errors and Appeals of New Jersey, 1892. 49 N. J. Eq. 302, 24 Atl. 926.)

On appeal from a decree advised by Vice Chancellor Bird.

BEASLEY, C. J. This bill has its footing in articles of agreement between a husband and wife providing for a separation. That instrument is exhibited by the complainant, and is to the effect following, to wit: That the husband will permit the wife during her life to live separate from him and to carry on a separate business, and that he will not reclaim or molest her; and, further, that he will pay to her during her life, for the support of herself and her two children, of whom she is to have the custody, the sum of $8 per week. To the performance of these stipulations the husband binds himself to his said wife, and to her trustee, who is a party to articles but who on his part does not enter into any covenant whatever. The agreements in favor of the husband made by the wife are that she will accept the designated weekly allowance "in full satisfaction for her support and maintenance, and for the support and maintenance of their said two children, and of all alimony during her coverture," and that she will not prevent the children from visiting or being visited by their father at proper times.

The prayer of the bill is that the husband shall be compelled to "specifically perform said articles of agreement, and especially that he do pay" the weekly sum stipulated for.

The husband, in his answer, admits the separation and the execution of the articles, and, in substance, sets up, by way of defence, that the wife violated her agreement with respect to his intercourse with his children; that she unreasonably hindered his and their interviews.

Upon these pleadings and the proofs taken the decision was in favor of the complainant, and three things were decreed, namely, first, that the articles of separation should be specifically performed; second, that the moneys stipulated for should be paid by the husband for the use of the wife, together with her costs; and, third, that the husband should have the right to visit his children in a certain mode and at specified times.

With respect to the mandate that the moneys and costs in question should be paid for the use of the complainant, this court is of opinion that the decree before us should in all respects be affirmed. These stipulations for the support of the wife, who is living separate from her husband with his assent, have always been regarded as enforceable in a court of equity in this state. This is plainly manifest from the decisions presently to be cited on another branch of our inquiry. And it would be singular indeed if the court should refuse to carry into effect stipulations of this character, for as there is nothing illegal in the fact of husband and wife living apart by mutual assent, and inasmuch as under such conditions the husband would be liable for the maintenance of the wife, it is difficult to see why equity should not enforce the payment of the sum of money that both parties have agreed to be a reasonable amount for that end. But it is not at all necessary either to labor or to elucidate the point, for the right to equitable relief by force of agreements of this character is regarded as res adjudicata.

Nor do we think that the objection that inasmuch as there is no covenant in these articles by the trustee for the benefit of the husband, therefore the stipulation to make the allowance to the wife is devoid of consideration should prevail. It is no doubt usual in these cases for the trustee to covenant with the husband to save him harmless from the debts contracted by the wife, and such covenants in some of the decisions have been referred to as the legal support of the husband's contract. But it seems plain that such a covenant would, as things are now circumstanced by the law of this state, be of no efficacy whatever. By force of our statutes a married woman can contract in her own name, but her husband cannot be affected by such conduct, so that, when living by his assent in a state of separation from him, it does not seem possible for her to put him to trouble by reason of her debts. In this case the wife agreed to live separate from her husband, and while so living to accept a certain weekly sum wherewith to support herself and children, and that stipulation she has fulfilled and the husband has received the benefit of such execution, and during the running of such contract has been absolved from all liability for the debts of his wife. In such a situation as this an agreement on the part of the trustee to indemnify the husband in this particular would add, in substance, nothing to the security of the latter. We think the contract of this appellant to pay the moneys in question rested on a sufficient consideration, and that such contract in this respect is properly enforced in the decree before us.

As to that other part of this decree which directs the articles of separation to be specifically performed, we think that so far forth it must be reversed. The doctrine that a court of equity will not aid to carry into effect an agreed separation between married persons has always been regarded as the law of this state. The doctrine was considered as settled law more than half a century ago, for, prior to the year 1831, Governor Williamson, sitting as chancellor, dealing with this subject, in the case of Melony v. Melony, thus strongly expressed his conviction: "I am clearly of opinion that the agreement between parties to live in a state of separation cannot be recognized in this court as valid, and that such agreement is a direct contravention of the marriage contract. It is contrary to sound policy as well as morality that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and cancelled, nor the parties absolved from their obligations under it by their private agreement." 1 N. J. Eq. 391.

In the case of Emery v. Neighbour, 7 N. J. Law, 151, 11 Am. Dec. 541, we find a similar expression of this equitable rule, which is reiterated in Calame v. Calame, 25 N. J. Eq. 552.

The result is, that whatever may be the recent perturbations of opinion on this subject so remarkably exhibited by the English Courts, we think that in this state the principle in question is so conclusively settled as not to be open to discussion. Married persons may agree to live apart and they may carry out such purpose, but the obligation to fulfill such contract is imperfect, for it will not be judicially enforced.

The decree before us, therefore, must be reversed so far as it directs these articles of separation to be in general specifically performed.

Nor can the third branch of this decree be sustained. It appoints the times and methods for the communication between the appellant and his children, but such affirmative relief cannot be given without a cross-bill, or an answer in the nature of one. The pleadings do not raise the question thus decided, and, consequently, the decree in this particular, is a mere interpolation.

Let the decree of this court be entered in accordance with the foregoing views. The respondent is entitled to her costs, both on this appeal and in the court below.[67]

For affirmance—None.

For reversal—The Chief Justice, Depue, Dixon, Garrison, Magie, Reed, Van Syckel, Werts, Bogert, Brown, Smith, Whitaker—12.

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[67] In a note to Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 124 Am. St. Rep. 966 (1907), in 12 L. R. A. (N. S.) 848, the cases are collected on all the points involved in the three preceding cases. A portion of the summary is here quoted: "It is now well settled law, with the exception of New Hampshire, and possibly North Carolina, in both the United States and England, that agreements for separation are valid and enforceable so far as property rights therein are concerned. The early English cases were contra, but they have long since been overruled. No case, however, has been found, in which the specific separation of the parties has been decreed, and, while there is some scant English authority where this provision seems to have been enforced, no case in the United States has been disclosed where such a holding was made. A conflict still exists as to the necessity of a trustee." In one or two states a voluntary separation for five years is made a ground for divorce. Stim. Am. Stat. Law, § 6212.

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